

STATE OF MICHIGAN  
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the complaint of )		
Carol Brooks against DTE Energy )		Case No. U-18012
<u>Company and DTE Electric Company )</u>		

**NOTICE OF PROPOSAL FOR DECISION**

The attached Proposal for Decision is being issued and served on all parties of record in the above matter on June 15, 2017.

Exceptions, if any, must be filed with the Michigan Public Service Commission, 7109 West Saginaw, Lansing, Michigan 48917, and served on all other parties of record on or before July 12, 2017, or within such further period as may be authorized for filing exceptions. If exceptions are filed, replies thereto may be filed on or before July 26, 2017.

**The Commission has selected this case for participation in its Paperless Electronic Filings Program. No paper documents will be required to be filed in this case.**

At the expiration of the period for filing exceptions, an Order of the Commission will be issued in conformity with the attached Proposal for Decision and will become effective unless exceptions are filed seasonably or unless the Proposal for Decision is reviewed by action of the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due.

MICHIGAN ADMINISTRATIVE HEARING  
SYSTEM  
For the Michigan Public Service Commission

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Sharon L. Feldman  
Administrative Law Judge

June 15, 2017  
Lansing, Michigan

STATE OF MICHIGAN  
MICHIGAN ADMINISTRATIVE HEARING SYSTEM  
FOR THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the complaint of )	
Carol Brooks against DTE Energy )	Case No. U-18012
<u>Company and DTE Electric Company )</u>	

**PROPOSAL FOR DECISION**

**I.**

**PROCEDURAL HISTORY**

This Proposal for Decision (PFD) addresses the issues raised in the contested case hearing initiated by the complaint of Carol Brooks. Ms. Brooks, through counsel, filed a Formal Complaint and Demand for Contested Case Proceeding on January 4, 2016, and subsequently, on the same date, filed a First Amended Formal Complaint and Demand for Contested Case Proceeding. The First Amended Complaint alleged that respondent DTE Energy wrongly disconnected electric service to Ms. Brooks without proper notice, and based on the company's erroneous claim that Ms. Brooks had stolen utility service. The complaint contained four counts. The first count alleged a violation of MCL 460.9q; the second count alleged a violation of MCL 460.10t; the third count alleged defamation; and the fourth count alleged intentional inflation of emotional distress. The complaint requested a contested case hearing, and an award of damages in favor of the complainant in whatever amount she is found entitled, along with costs and interest.

On January 5, 2016, the Commission's Regulatory Affairs Division determined that the First Amended Complaint stated a prima facie case as required by R 792.10442. The complaint was served on the Respondent on February 18, 2016, and a prehearing conference was set for March 17, 2016. Subsequently, the prehearing conference was adjourned to April 7, 2016, by agreement of the parties, to facilitate settlement discussions. The date for Respondent to answer the complaint was also adjourned from March 10, 2016 to March 24, 2016.

Consistent with this schedule, DTE Electric (DTE) filed an Answer to First Amended Complaint and Affirmative Defenses on March 24, 2016. In this answer, DTE admitted certain allegations, denied certain allegations, and neither admitted nor denied other allegations. The answer alleged that Ms. Brooks obtained electric service without authorization beginning August 31, 2009, when DTE alleges that the meter to Complainant's home was disconnected, through January 6, 2015, when DTE cut service at the pole. DTE disputed the validity of the claims in the First Amended Complaint, and requested that the complaint be dismissed in its entirety. DTE also disputed the Commission's jurisdiction over the claims for damages and defamation, and stated several affirmative defenses, including the following: Ms. Brooks failed to exercise reasonable and ordinary care, caution, prudence, and due diligence to protect her own interests, and failed to make a reasonable investigation in connection with her allegations regarding the allegations of unauthorized use; any injuries to Ms. Brooks were the result in whole or in part of her negligence and fault, breach of contract or applicable tariffs; Ms. Brooks failed to and refused to comply with or perform contractual conditions precedent to filing her claims; Ms. Brooks failed to mitigate, avoid, or

minimize damages; and some or all of the claims are barred due to equitable doctrines of unclean hands, estoppel or laches, and privity. DTE also asserted that its actions were lawful and conducted pursuant to applicable tariffs, rules, and regulations of the Commission, that it did not engage in misconduct or breach any duty to Ms. Brooks, that it made no false statements, made no statements known at the time to be false, and made no statements recklessly, and that it had a qualified privilege applicable to any statements it made. DTE also asserted that Ms. Brooks' claims were frivolous and interposed for improper purposes, in violation of MCR 2.114. DTE also asserted that DTE, rather than DTE Energy, is the proper respondent in this matter.

At the April 7, 2016 prehearing conference, counsel for Ms. Brooks, DTE, and Staff agreed to a consensus schedule for the proceedings. Consistent with this schedule, on May 20, 2016, Ms. Brooks filed the testimony of two witnesses, herself and her sister, Myra Hawkins. At the request of the Administrative Law Judge, the testimony was subsequently refiled to omit certain personal information. On June 22, 2016, DTE filed the testimony of seven witnesses, DTE employees Veronique Watkins, Sheldon Stanley, Ebony Reid, James Skotzke, Joanna Adkins, Shannon Robinson, and Wayne Trousdale. On August 12, 2016, Ms. Brooks filed rebuttal testimony from herself and Ms. Hawkins, and two additional witnesses, Dave Taylor and Lisa Okasinski.

On August 25, 2016, Ms. Brooks filed a Second Amended Formal Complaint and Demand for Contested Case Proceeding (Second Amended Complaint). The Second Amended Complaint contained 18 counts, and named both DTE Energy and DTE as respondents. The first two counts alleged statutory violations under MCL 460.9q and MCL 460.10t; counts III through XIII alleged violations of the Commission's billing rules;

counts XIV through XVII alleged the torts of fraud, intentional infliction of emotional distress, and defamation, and count XVIII sought exemplary damages. On September 2, 2016, the parties submitted a Stipulated Order to Dismiss Tort Claims Without Prejudice and Toll the Statute of Limitations, in which they agreed that the tort claims in counts XIV through XVIII should be dismissed without prejudice, and the statute of limitations for those claims tolled, so that they could be filed in Wayne County Circuit Court. The ALJ issued a ruling dated September 13, 2016, adopting the stipulation.

The parties also agreed to a revised schedule including a date for DTE to answer the Second Amended Complaint and revised dates for an evidentiary hearing. Consistent with this schedule, on September 15, 2016, DTE filed its Answer to the Second Amended Complaint. The answer contained similar affirmative defenses to those set out in DTE's first answer, adding the affirmative defense of setoff in the amount of \$6,932.71. DTE again alleged that the Second Amended Complaint was signed in violation of the Michigan Court Rules, MCR 2.114, characterizing the complaint as "frivolous, without merit, . . . not based upon knowledge, information and belief formed after reasonable inquiry, . . . not well grounded in fact, and/or . . . not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."<sup>1</sup>

On September 12, 2016, Complainant filed a Motion for Spoliation Sanctions Against Respondents, which was noticed for a hearing on September 27, 2016. The gravamen of Ms. Brooks' motion was a claim that when DTE replaced Complainant's meter with an AMI meter on February 24, 2016, Respondent failed to preserve the meter or to test its accuracy. DTE filed a reply to this motion on September 23, 2016.

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<sup>1</sup> See page 39, paragraph 26.

DTE also filed a Motion for Adjournment of the Scheduling Order on September 14, 2016, which was set for a hearing on the same date as Ms. Brooks' spoliation motion. DTE's motion sought additional filing dates for testimony addressing the allegations in the Second Amended Complaint. Ms. Brooks filed a response to this motion on September 23, 2016. At the hearing on these motions, following oral argument, the ALJ revised the schedule to permit DTE to file supplemental direct testimony to address the allegations in the Second Amended Complaint, and to allow Ms. Brooks the opportunity to file supplemental rebuttal testimony, with revised dates for motions to strike testimony.<sup>2</sup> Regarding the spoliation sanctions, the ALJ acknowledged grounds for Complainant's concern that the meter serving Complainant had been destroyed without being tested, but deferred adoption of any adverse inferences pending development of a complete record.<sup>3</sup>

Consistent with the revised schedule, DTE filed the supplemental testimony of four witnesses, Ms. Reid, Ms. Adkins, Ms. Robinson, and Mr. Skotzke. Ms. Brooks filed a supplemental rebuttal exhibit on December 1, 2016. Both Ms. Brooks and DTE filed motions to strike portions of the prefiled testimony and exhibits. In addition, DTE filed a motion to quash a subpoena Ms. Brooks issued to Consumers Energy Company. At the January 11, 2017 hearing on these motions, the ALJ struck limited portions of the testimony of Ms. Brooks and DTE witnesses Ms. Adkins, and Mr. Skotzke.<sup>4</sup> The motion to quash the subpoena issued to Consumers Energy was resolved with a ruling that the complainant could introduce the document Consumers Energy had already provided, the form notice it uses to inform a consumer of an unauthorized use allegation, in order

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<sup>2</sup> See 2 Tr 21-23, 40.

<sup>3</sup> See 2 Tr 37.

<sup>4</sup> See 3 Tr 45-86.

to illustrate Ms. Brooks' view of an appropriate notice when a utility disconnects power based on a claim of unauthorized use, but not as evidence of a "standard" for such notices.<sup>5</sup>

## II.

### **OVERVIEW OF THE RECORD**

The evidentiary record is contained in 383 transcript pages in 5 volumes and 38 exhibits. This section reviews the evidentiary record, beginning with the direct presentations of the parties and then turning to the rebuttal testimony and any cross-examination.

#### A. Complainant

Ms. Brooks presented the testimony of 2 witnesses as part of her direct case, herself and her sister, and additional rebuttal testimony from these two witnesses as well as an electrician.

##### 1. Ms. Brooks

Ms. Brooks testified on her own behalf, presenting direct and rebuttal testimony. In her direct testimony, she reviewed the events leading to the disconnection of her electric service on January 6, 2015. She testified that she lives in the lower unit of a two-unit building on Monica Street in Detroit ("the Monica property) and has lived there for 37 years. She described herself as currently unemployed, on permanent disability with a fixed income. She testified that on December 5, 2014, a DTE technician came to her house, indicating that he had been asked to turn on the utility service to the upper unit. This technician disconnected her furnace and also told her that he would have to

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<sup>5</sup> See 3 Tr 86-96.

turn her electric service off because her bill had not been paid since 2009. She testified that DTE did disconnect her electric service on January 6, 2015.<sup>6</sup>

Ms. Brooks described her communications with DTE following the December 5, 2014 visit by the DTE technician, and following the January 6, 2015 disconnection. Beginning on December 6, 2015, Ms. Brooks said she called the DTE “resolution department” and was told she owed \$7,000 because she had not paid her bill in 5 years. Ms. Brooks testified that she was not aware she had not been paying her bill.<sup>7</sup> She described her visits to DTE offices on December 8 and December 12, 2014. Ms. Brooks testified that she was accused of theft, and that when she asked to see a bill, she was told that DTE would not provide any documents. Ms. Brooks presented Exhibit C-1 and Exhibit C-2 as DTE records documenting these communications.

Ms. Brooks testified that DTE never sent a shutoff notice before disconnecting her electric service on January 6, 2015, citing Exhibit C-3 as the last bill she received before the disconnection.<sup>8</sup> Ms. Brooks testified that she next asked her sister, Ms. Hawkins, for help. She presented Exhibit C-4 to show the statement she and her sister prepared, seeking additional information from DTE. She testified that DTE again did not provide any documents to verify the amount it claimed she owed, continued to refuse to restore her service unless she paid \$6,750, and refused to set up a meeting with either of them.<sup>9</sup>

Ms. Brooks testified that she sought legal help in October of 2015. She testified that on October 22, 2015, her attorney called an attorney for DTE, and was expecting

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<sup>6</sup> See 4 Tr 114-115.

<sup>7</sup> See 4 Tr 116.

<sup>8</sup> See 4 Tr 117.

<sup>9</sup> See 4 Tr 119.

that the DTE attorney would send a “theft investigation report,” but the DTE attorney did not do so.<sup>10</sup> She presented Exhibit C-5, containing email communications between Ms. Brook’s attorney and an attorney for DTE.<sup>11</sup> She testified that a follow-up letter, Exhibit C-6, was sent to DTE on December 8, 2015, but DTE did not respond.<sup>12</sup>

Ms. Brooks testified that she paid every bill DTE sent her over the five-year period from 2009 to 2015, and has paid every bill since she moved to the property. She testified that some months she would make partial payments or get help from the Michigan Department of Health and Family Services (now the Michigan Department of Health and Human Services or MDHHS, formerly the Michigan Department of Human Services or MDHS), or from her family.<sup>13</sup> She testified that she receives one bill for both gas and electric utility service, and did not realize she was not being billed for electric service.<sup>14</sup> She presented Exhibits C-7 through C-10 as examples of bills she received at various points in time.

Ms. Brooks testified that contrary to DTE’s claim, her electric service was not disconnected in August 2009.<sup>15</sup> Ms. Brooks also presented as Exhibit C-11 the bill she received in August 2009. She testified that the bill does state that it is a shutoff notice, but it does not provide the date of shutoff. She testified that when she received this bill, she immediately contacted the Department of Health and Family Services for help with the payment, and testified that the agency made the payment on September 3, 2009.<sup>16</sup> Referencing her Exhibit C-12, she testified that her utility bill due October 7, 2009

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<sup>10</sup> See 4 Tr 120.

<sup>11</sup> See 4 Tr 120-121.

<sup>12</sup> See 4 Tr 120.

<sup>13</sup> See 4 Tr 121, 127.

<sup>14</sup> See 4 Tr 121.

<sup>15</sup> See 4 Tr 126, 127.

<sup>16</sup> See 4 Tr 123-124.

reflects her September 3, 2009 payment, does not refer to a shutoff, and shows that she was being billed for both gas and electric service in September 2009.<sup>17</sup> Ms. Brooks testified that she has received other bills mentioning shutoff when her service was not disconnected. Ms. Brooks also testified that she did not receive any other communication regarding shutoff following her receipt of the August bill through the August 31, 2009 date DTE alleges that it disconnected her electrical service.<sup>18</sup>

Ms. Brooks also testified that she did not receive any shutoff notices in 2014 or 2015, prior to DTE's visit on December 5, 2014 or prior to its disconnection of her service on January 6, 2015.<sup>19</sup> Ms. Brooks cited her Exhibit C-13, a November 23, 2015 record from a DTE employee sent to the property to conduct an investigation, which stated: "No theft on meter servicing both flats old meter sill on home but is drip cut."<sup>20</sup> She testified that DTE did not contact her after it concluded that there was no theft of electric service, and she did not learn that DTE had conducted an investigation until February 19, 2016.<sup>21</sup>

Ms. Brooks testified that she was without service from January 6, 2015 through February 24, 2016, and described the difficulties she experienced.<sup>22</sup> She also acknowledged running extension cords from the upper unit, to plug in microwaves, etc. Ms. Brooks also presented rebuttal testimony and was cross-examined, as discussed in section C below.

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<sup>17</sup> See 4 Tr 124-145.

<sup>18</sup> See 4 Tr 126.

<sup>19</sup> See 4 Tr 126.

<sup>20</sup> See 4 Tr 128.

<sup>21</sup> See 4 Tr 128.

<sup>22</sup> See 4 Tr 127, 129.

## 2. Ms. Hawkins

Ms. Hawkins is Ms. Brooks' sister and until recently, she owned the building Ms. Brooks lives in. She testified to many of the same facts as Ms. Brooks. She testified that Ms. Brooks contacted her in December 2014 after her furnace stopped working, after Ms. Brooks had already made a visit to DTE's offices. Ms. Hawkins testified that when she herself called DTE, she was told that DTE was treating the matter as a theft, and was told to contact Ms. Watkins.<sup>23</sup> She testified that before she did that, on January 6, 2015, DTE disconnected Ms. Brooks' electric service.<sup>24</sup>

Ms. Hawkins testified that she called Ms. Watkins on January 8, 2015, and that Ms. Watkins told her Ms. Brooks' electric service was disconnected because of theft and that Ms. Brooks would have to pay \$6,750 to have service restored. She further testified that Ms. Watkins refused to provide documentation or to set up a meeting, stating that DTE "does not take appointments."<sup>25</sup> Ms. Hawkins testified that Ms. Watkins directed her to the "DTE Resolution Department," further directing Ms. Hawkins to tell that department "there was a theft", and then DTE would give her the total bill she would need to pay in full.<sup>26</sup>

Ms. Hawkins testified that her sister had not mentioned an overdue bill, and will usually ask for help, or seek assistance from MDHHS. She testified that she and her sister wrote up a statement that was eventually given to Ms. Watkins, as shown in Exhibit C-4. She testified that Ms. Watkins phoned her on March 30, 2015, and Ms. Watkins again refused to help resolve the dispute, stating that Ms. Brooks was

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<sup>23</sup> See 4 Tr 160.

<sup>24</sup> See 4 Tr 161.

<sup>25</sup> See 4 Tr 161.

<sup>26</sup> See 4 Tr 161.

required to pay DTE \$6,750 and refusing to provide any documentation.<sup>27</sup> She presented as Exhibit C-15 DTE's memorandum of this communication. Ms. Hawkins testified that after this, she and her sister decided they needed to hire an attorney.

The Complainant also presented Exhibit C-17 as part of its direct case, and example of the shutoff notice used by Consumers Energy when it suspects unauthorized use.

B. DTE

DTE witnesses presented direct and supplemental direct testimony as summarized below, starting with the testimony of Ms. Robinson, who presented DTE records regarding service to Ms. Brooks, then turning to the testimony of Mr. Trousdale, who visited the property on December 5, 2014. Of the remaining witnesses, Ms. Reid, Ms. Adkins, and Ms. Watkins had communications with Ms. Brooks or Ms. Hawkins regarding DTE's claim that Ms. Brooks had engaged in unauthorized use, while Mr. Skotzke calculated what DTE believes Ms. Brooks' bill would have been for the period September 14, 2009 through January 6, 2015.

1. Ms. Robinson

Ms. Robinson is an Assigned Account Analyst for DTE, and was an Executive Customer Consultant when she prepared her prefiled testimony in this matter. Ms. Robinson did not have direct communication with Ms. Brooks or Ms. Hawkins regarding this dispute. The purpose of her testimony was to review DTE records relating to Ms. Brooks' account. She presented portions of the company's records in Exhibits R-1 through R-11. She testified that due to the age of the reprints, some of the

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<sup>27</sup> See 4 Tr 162.

billing statements may include possible formatting differences, such as the omission of usage graphs.<sup>28</sup>

Ms. Robinson testified that DTE Electric disconnected Ms. Brooks' service on December 6, 2007, on August 31, 2009, and on January 6, 2015.<sup>29</sup> She testified that the shutoff notice in Exhibit R-2 was mailed on November 8, 2007, indicating a \$183.21 payment required by November 26, 2007. She testified that DTE records reflect that Ms. Brooks called to request restoration on December 7, 2007, and paid the full outstanding balance of \$301.43, and was also billed for a deposit of \$304, and a \$20 meter-reconnection fee.<sup>30</sup>

Ms. Robinson testified that restoration was scheduled December 10, 2007, but a field representative was unable to enter the yard because of a dog, with no one at home. She testified that the company records show the Complainant contacted DTE again on December 17, 2007, and DTE scheduled a field representative to turn service on December 18, 2007. She testified that the records indicate that when the field service representative arrived, the meter was already on and active.<sup>31</sup>

Ms. Robinson testified that both the electric and gas service were disconnected on August 31, 2009. She testified that Exhibit R-4 includes the shutoff notices. Ms. Robinson's initial prefiled testimony stated that the outstanding balance was \$451.35, but she corrected this figure on the witness stand to state that the past due balance that needed to be paid to avoid shutoff was \$326.69.<sup>32</sup> Further, she testified that this balance needed to be paid by August 24, 2009 to avoid shutoff. She presented

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<sup>28</sup> See 4 Tr 228.

<sup>29</sup> See 4 Tr 228.

<sup>30</sup> See 4 Tr 228-229.

<sup>31</sup> See 4 Tr 229.

<sup>32</sup> See 4 Tr 220.

Exhibit R-5 as company records indicating that both electric and gas service were disconnected on August 31, 2009.

Ms. Robinson then testified that on September 14, 2009, “the Complainant ceased being billed for electrical services to the site while the gas service continued to bill as normal.”<sup>33</sup> She testified that gas service continued to be billed “because no final meter read was entered into the system by the field service representative, whereas the final meter reading for electric was entered on August 31, 2009.”<sup>34</sup> She presented Exhibit R-6 to show examples from DTE records of bills from the October 2009 through January 2015 time period, which she testified shows usage and charges only for gas service. Ms. Robinson further testified that routine meter readings were obtained each month, and the electric meter continued to register consumption, “even though there was no responsible party listed at the site for electricity and the meter had been disconnected by the company on August 31, 2009.” She presented Exhibit R-7 to show that Ms. Brooks received agency assistance in making the payment of \$326.69 on September 3, 2009, but testified that DTE has no record of the Complainant contacting the company to request restoration of service. She further testified that Ms. Brooks never called to inquire why she was not being billed for electric service.<sup>35</sup>

Turning to 2014, Ms. Robinson testified that DTE determined that the meter was registering “unauthorized usage” based on Mr. Trousdale’s December 5, 2014 visit, stating “meter readings on the account also indicated unauthorized usage.” She

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<sup>33</sup> See 4 Tr 230.

<sup>34</sup> See 4 Tr 230.

<sup>35</sup> See 4 Tr 231.

presented Exhibit R-8 as the referral for the line department to disconnected electric service from the pole.<sup>36</sup>

Citing the testimony of Ms. Adkins and Ms. Reid, Ms. Robinson testified that Ms. Brooks was advised she would be invoiced for the unauthorized usage “when she indicated that she was ready to pay.”<sup>37</sup> She also cited Exhibit R-9. Ms. Robinson also testified that DTE has no record Ms. Brooks made any payment to restore electrical service at the site.<sup>38</sup> Ms. Robinson testified that DTE’s records reflect that Complainant’s attorney made a request to restore service on February 19, 2016, as reflected in Exhibit R-10, and a service order was placed as shown in Exhibit R-11.

Addressing Ms. Brooks’ testimony that she was not aware that electric usage had been taken off her bill, Ms. Robinson acknowledged that Ms. Brooks receives a combined electric and gas bill. She testified that the first page of the bill shows the total current charges, while the second page “lists the amount due for each utility service.”<sup>39</sup> She testified that as of the October 2009 billing cycle, “Ms. Brooks’ bill statement indicates that she was only being billed for gas charges.”<sup>40</sup> She provided examples of these bills in her Exhibit R-6. To explain why Ms. Brooks was billed for electric service through September 14, 2009, Ms. Robinson testified:

Although service was terminated on August 31, 2009, the billing system is designed to wait for the completion of the billing cycle before closing the customer’s service agreement. Because Ms. Brooks’ meter was still registering usage, she was billed for that service.<sup>41</sup>

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<sup>36</sup> See 4 Tr 231.

<sup>37</sup> See 4 Tr 232.

<sup>38</sup> See 4 Tr 232.

<sup>39</sup> See 4 Tr 233.

<sup>40</sup> See 4 Tr 233.

<sup>41</sup> See 4 Tr 233.

Discussing DTE's shutoff procedures, Mr. Robinson testified that none of the bills after the August 31, 2009 shutoff date reflected in DTE's records would mention the shutoff. She testified that because the past due balance was paid by MDHS on September 3, 2009, no past due amount would have shown in DTE's system for electric service.<sup>42</sup> Ms. Robinson testified that the shutoff notice included with a monthly bill is in red, citing Exhibits R-2 and R-4. She testified that the statement will advise the customer of the amount required for payment and the date by which payment must be received to avoid a shutoff.<sup>43</sup> She further testified that if there is "unauthorized use," DTE does not have a responsible party to bill, with "no customer of record," and there are no shutoff notices or monthly bill statements mailed.

Ms. Robinson further testified that as of December 6, 2014, Ms. Brooks had not advised DTE that she is a low-income customer, asserting that it is the customer's responsibility to advise DTE, unless they have received assistance payments in the last 12 months. Ms. Robinson also testified that as of April 5, 2016, Ms. Brooks moved to the second-floor unit at the property.<sup>44</sup>

In her supplemental testimony, Ms. Robinson addressed the August 2009 shutoff notice further. She acknowledged that September 8, 2009 is the only date listed for payment, but testified that the past due amounts were due "immediately."<sup>45</sup> She cited the June 19, 2009 bill for comparison, in Exhibit R-4, showing a due date for past due amounts in red and a due date for current charges in black. She asserted that the August 2009 bill also stated that the account "remained in shutoff status" because of the

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<sup>42</sup> See 4 Tr 233-234.

<sup>43</sup> See 4 Tr 233-235.

<sup>44</sup> See 4 Tr 236-237.

<sup>45</sup> See 4 Tr 240.

past due balance.” Also acknowledging that two different amounts are shown on that bill, she testified that the amount of \$202.03 was listed erroneously.

Ms. Robinson also presented Exhibit R-15, an MDHHS contact note. She acknowledged that MDHHS contacted DTE to inquire about the status of the bill on August 19, 2009, but she characterized it as a general inquiry rather than a commitment to pay, and explained that only a commitment generates a 30-day hold on shutoff.<sup>46</sup> Further, she testified that DTE does not typically contact customers after their service has been shut off, although it may contact customers to collect a debt.<sup>47</sup>

Turning to the 2015 shutoff, she testified that a shutoff for unauthorized use is not considered an involuntary shutoff, and therefore no attempts were made to contact someone at the first floor of the property: “In cases of unauthorized usage, there is no active customer account, so no shutoff notice is required.”<sup>48</sup>

Responding to a specific count of the second amended complaint alleging that DTE failed to offer Ms. Brooks the opportunity for an informal hearing, Ms. Robinson testified that shutoff notices issued by DTE inform customers of their hearing rights in accordance with Commission rules, but testified that the Complainant would not have been advised of her right to an informal hearing in 2014 or 2015 because there was no electric customer of record and service was being disconnected due to unauthorized usage.<sup>49</sup> Ms. Robinson also reviewed the steps leading from DTE’s February 19, 2016

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<sup>46</sup> See 4 Tr 241-242.

<sup>47</sup> See 4 Tr 242.

<sup>48</sup> See 4 Tr 242.

<sup>49</sup> See 4 Tr 242.

agreement with Complainant's counsel to restore service to Ms. Brooks to the restoration of that service on February 24, 2016.<sup>50</sup>

Complainant cross-examined Ms. Robinson. In this testimony, Ms. Robinson acknowledged that no notice was provided prior to the disconnection of Ms. Brooks' service on January 6, 2015. She testified that even if DTE found a responsible party, in the case of unauthorized usage, it would not provide a shutoff notice.<sup>51</sup> She acknowledged that as early as December 2014, DTE was demanding a \$7,000 payment from Ms. Brooks, as reflected in the December 8, 2014 note in Exhibit C-1.<sup>52</sup>

Asked how a customer could dispute a finding of unauthorized usage, Ms. Robinson testified that the customer would have to discuss that with the Revenue Management and Protection department of DTE. Ms. Robinson also testified that DTE does not have a form similar to Exhibit C-17, which is used by Consumers Energy. Ms. Robinson also stated that she does not know whether a notice could be sent to an address rather than a named customer, testifying that she has only seen notices with the name of the customer of record.<sup>53</sup> Asked about a shutoff notice dated September 13, 2016, Exhibit C-22, Ms. Robinson testified that she does not know what that notice is about, acknowledging that the prior bill dated August 10, 2016, Exhibit C-23, shows a credit balance.<sup>54</sup> Ms. Robinson concluded that the shutoff notice was sent in error.<sup>55</sup>

Turning to the August 14, 2009 billing statement in Exhibit R-4, Ms. Robinson acknowledged that it is "a bit confusing," and that she initially concluded that it required

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<sup>50</sup> See 4 Tr 243.

<sup>51</sup> See 4 Tr 247.

<sup>52</sup> See 4 Tr 249-249.

<sup>53</sup> See 4 Tr 253-255.

<sup>54</sup> See 4 Tr 256-258.

<sup>55</sup> See 4 Tr 258.

a payment of \$451.35.<sup>56</sup> She testified that the amount of \$202.03 shown on the billing statement was in error. She also testified that DTE can list the date by which payment is required to avoid shutoff in the top left corner, but she is not sure whether DTE is required to do so. She agreed that the shutoff notice did not identify August 24, 2009 as the date payment was required.<sup>57</sup> She also agreed that the bill specified that current charges were due September 8, 2009.<sup>58</sup>

Ms. Robinson again asserted that both gas and electric service were shut off in August, 2009, but that DTE continued to bill Ms. Brooks for gas service. She agreed that despite DTE's "disconnection" of the gas service, Ms. Brooks did not experience any interruption in her service.<sup>59</sup> Discussing the September 2009 bill Ms. Brooks received, Ms. Robinson acknowledged that it shows full payment of the \$326.69 required to avoid shutoff, and that this bill shows electric service continuing to be billed.<sup>60</sup> Ms. Robinson acknowledged that the September 2009 bill did not state anything about shutoff, or indicate that Ms. Brooks' electric service had been disconnected.<sup>61</sup> She also testified that she is not aware of any phone calls made to Ms. Brooks before the date DTE claims service was disconnected, and she is not sure whether anything else was sent by mail.<sup>62</sup> She testified that it is DTE's policy not to send out any shutoff notices other than the notice included in the billing statement.<sup>63</sup>

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<sup>56</sup> See 4 Tr 259-260.

<sup>57</sup> See 4 Tr 260.

<sup>58</sup> See 4 Tr 261.

<sup>59</sup> See 4 Tr 262.

<sup>60</sup> See 4 Tr 262-264.

<sup>61</sup> See 4 Tr 264.

<sup>62</sup> See 4 Tr 264-265. As discussed below, the parties subsequently stipulated that DTE made phone calls to Ms. Brooks' residence on the following dates: June 29, 2009, July 8, 2009, and July 9, 2009.

<sup>63</sup> See 4 Tr 265.

She testified that DTE records do not reflect any other communication to Ms. Brooks following the disconnection.

Acknowledging that Ms. Brooks has received a combined gas and electric bill since before August 2009, Ms. Robinson testified that the billing statement dated June 19, 2009 has no reference to electric usage, although DTE was billing Ms. Brooks for electric service.<sup>64</sup> Regarding her testimony that the formatting of the bill copies generated by the system could exclude bar graphs, Ms. Robinson testified she did not know whether all bills contain bar graphs.<sup>65</sup>

Regarding her testimony addressing the 2016 service restoration to Ms. Brooks, Ms. Robinson acknowledged that the February 2016 date she included in her testimony as the date Ms. Brooks counsel requested that service be turned on was only the first request that Ms. Robinson was aware of. Ms. Robinson also testified that to her, the term “unauthorized use” does not necessarily involve wrongdoing, but means only that “there’s no active customer at the site to be billed for electricity.” She believes DTE could find unauthorized use in cases in which the customer had not acted unlawfully.<sup>66</sup> Ms. Robinson also testified that no investigation was done in this case in which fraud, tampering, etc. were found.

On redirect, Ms. Robinson amended her testimony regarding the shutoff notice in Exhibit C-22, stating that she would need to do additional research to try to determine why the notice was sent, which she had not done.<sup>67</sup>

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<sup>64</sup> See 4 Tr 267.

<sup>65</sup> See 4 Tr 268.

<sup>66</sup> See 4 Tr 270-273.

<sup>67</sup> See 4 Tr 276.

## 2. Mr. Trousdale

Mr. Trousdale is a Field Service Representative for DTE. After reviewing his background, Mr. Trousdale testified that he visited the property on December 5, 2014 to execute what he believed to be a routine turn-on order.<sup>68</sup> He testified that his Exhibit R-12 is a company record containing the turn-on order and a record of his observations during his visit to the property on that date.

Mr. Trousdale testified that the second-floor meter was already on, there was a heavy load on that meter, and the electric box was sealed with a blue seal. He testified that he checked the voltage and found electrical backfeed from inside the house, “which was coming from the first floor meter.”<sup>69</sup> He explained backfeed as electricity flowing the wrong way or from inside the house out to the electric meter box, and testified that in a building with more than one meter, if the distribution wires are crossed between residents, electricity can flow from one resident’s breaker panel backwards to another resident’s breaker panel. He testified that with the assistance of a gentleman at the first floor unit, he traced the back feed to the breaker panels, where he “observed that some wires were crossed so as to feed electricity from the second floor meter to the first floor if the first floor’s power was shut off. Similarly, if the second floor power was shut off, then the first floor meter would feed power to the second floor.”<sup>70</sup> He testified that “for safety reasons” he shut both the breaks off that were causing the backfeed, but he did not shut off the power to either unit. He acknowledged that one of the breakers he turned off may have fed the first-floor furnace.<sup>71</sup> He testified that he advised the

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<sup>68</sup> See 4 Tr 206.

<sup>69</sup> See 4 Tr 207.

<sup>70</sup> See 4 Tr 208.

<sup>71</sup> See 4 Tr 209.

gentleman that an electrician would be required to make the repairs.<sup>72</sup> He testified that he also noticed a wire leading from the second-floor breaker panel to the third floor, which he concluded explained the heavy load on the second-floor meter.

Mr. Trousdale testified to his observation that the connections at the drip loop had exposed electrical connections or taps “as if possibly reconnected.”<sup>73</sup> He testified that he placed an order for an overhead truck to fix the exposed taps to make them safe.

Mr. Trousdale testified that he then contacted the management company that was listed on his work order, and advised the woman answering its phone that the first-floor power is on, but should not be on according to DTE records.<sup>74</sup> He stated that he told the woman that the first-floor service would probably be shut off at some point “because the account is inactive.”<sup>75</sup> He testified that he told Ms. Brooks the same thing.<sup>76</sup>

Asked what else he observed at the property, Mr. Trousdale testified that the first-floor meter had two locks on it but no seal, and he called the company to verify whether the account was in good standing, so he could apply a valid seal. He testified that he told Ms. Brooks that “the account is not valid for the first floor.”<sup>77</sup> He then testified that he did not tell Ms. Brooks he would be turning off her electric service, only that she needed to call the company.<sup>78</sup>

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<sup>72</sup> See 4 Tr 209.

<sup>73</sup> See 4 Tr 208.

<sup>74</sup> See 4 Tr 209.

<sup>75</sup> See 4 Tr 209.

<sup>76</sup> See 4 Tr 209.

<sup>77</sup> See 4 Tr 210.

<sup>78</sup> See 4 Tr 210.

Mr. Trousdale then took issue with Ms. Brooks' testimony at Tr 115, line 12. Mr. Trousdale testified that he "did explain that her electric was unauthorized and that she needed to call the Company to get this resolved, but [he] did not tell her that [he] would be turning off her electric service."<sup>79</sup> Then Mr. Trousdale took issue with Ms. Hawkins' testimony at Tr 160, line 9, in which she testified that DTE did not inform her it would be turning off the electricity to the unit. Mr. Trousdale speculated that it may have been Ms. Hawkins that he spoke with when he called the management company.<sup>80</sup> He then testified:

Even if it was not Ms. Hawkins' on the phone, I did nevertheless did notify someone from her management company that the account was invalid since that was the contact information that I was provided on the DTE turn on order. I do not recall if Ms. Hawkins had stated her name on the phone when I made the phone call on December 5, 2014.<sup>81</sup>

Complainant cross-examined Mr. Trousdale on his testimony. He testified that he is not a theft investigator for DTE, although there is such a position at the company. He explained the training he is required to have, to ensure safety.<sup>82</sup> He acknowledged that he made a remark regarding theft in the paperwork he completed following his visit to the property, explaining that he meant that service was unauthorized because the account was invalid when he called dispatch.<sup>83</sup> He then testified that he believes theft is the same as unauthorized use. He reiterated that there was no seal on the first floor meter, but acknowledged that his report did not state anything about tampering. He stated that he did not base his finding of unauthorized use on anything other than his observation that the first-floor meter was locked but on and not associated with a valid

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<sup>79</sup> See 4 Tr 210.

<sup>80</sup> See 4 Tr 211.

<sup>81</sup> See 4 Tr 211.

<sup>82</sup> See 4 Tr 212-213.

<sup>83</sup> See 4 Tr 215.

account.<sup>84</sup> He acknowledged that he did not make any entries on his report under the heading of “theft investigation.” He further testified that he “would have believed” DTE conducted a theft investigation between his December 5, 2014 visit and the January 6, 2015 shutoff. He testified that it would have been “unusual” for DTE to shut power off without doing an investigation.<sup>85</sup> He also agreed that if a meter is turned off, backfeed would not cause it to register use.<sup>86</sup>

### 3. Ms. Reid

Ms. Reid is a Collection Representative in the ID Fraud department of DTE, doing research on address sites to prevent or identify fraud victims.<sup>87</sup> She testified that Exhibit C-1 reflects her December 8, 2014 meeting with Ms. Brooks, particularly noting her statement that Ms. Brooks was responsible for unauthorized usage charges at the address. She testified that she speaks frequently with individuals who have had service disconnected due to unauthorized use.<sup>88</sup> She testified that when a customer comes in, if the site is coded in the system as a “theft”, the customer service representative calls the Theft department and obtains an estimated charge.<sup>89</sup> She testified that this is how she handled communications with Ms. Brooks. She stated that “it was coded in the system as a theft,” and that she could not generate a bill because Ms. Brooks was not ready to pay the charges.

Ms. Reid testified, however, that she did not accuse Ms. Brooks of theft, stating that is “strictly prohibited.”<sup>90</sup> Instead, Ms. Reid testified, she “advised her of

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<sup>84</sup> See 4 Tr 216.

<sup>85</sup> See 4 Tr 216.

<sup>86</sup> See 4 Tr 218.

<sup>87</sup> See 4 Tr 310.

<sup>88</sup> See 4 Tr 311.

<sup>89</sup> See 4 Tr 312.

<sup>90</sup> See 4 Tr 312-313.

unauthorized usage.” She testified that the Energy Resolution department is commonly referred to as the Theft department.<sup>91</sup>

In her supplemental testimony, she also acknowledged that she had not offered Ms. Brooks a payment plan, testifying that DTE does not offer payment plans in the case of unauthorized usage.<sup>92</sup> She testified that there are 2 reasons DTE does not prepare a bill until the person is ready to pay. The first reason is to avoid the person using the bill to declare bankruptcy, and the second reason is to avoid the person trying to get assistance from a State agency.<sup>93</sup> She then testified that “agencies do not pay for unauthorized use” and would retract any payment.<sup>94</sup>

Ms. Reid was also cross-examined on her testimony, and specifically acknowledged the contents of her note in Exhibit C-1.<sup>95</sup> She testified that her notes accurately reflect her meeting with Ms. Brooks, and clarified that “to her knowledge” she did not use the word “theft” when talking to Ms. Brooks.<sup>96</sup> She then testified: “We do use the word theft interchangeably with unauthorized usage.”<sup>97</sup> She testified that she understands both terms have the same meaning. She stated that unauthorized use only includes situations in which someone acted unlawfully.<sup>98</sup> Asked again whether it was possible she used the word “theft,” she testified that she does not recall, but “we do not talk to our customers that way.”<sup>99</sup>

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<sup>91</sup> See 4 Tr 313.

<sup>92</sup> See 4 Tr 315-316.

<sup>93</sup> See 4 Tr 315.

<sup>94</sup> See 4 Tr 315-316.

<sup>95</sup> See 4 Tr 318.

<sup>96</sup> See 4 Tr 319.

<sup>97</sup> See 4 Tr 319.

<sup>98</sup> See 4 Tr 325.

<sup>99</sup> See 4 Tr 325.

Ms. Reid also stated that in her conversation with Ms. Brooks, she was only advising Ms. Brooks of what was “already profiled” on the account; she herself does not make the findings.<sup>100</sup> She testified that she was not aware of any theft investigation prior to the date of her meeting with Ms. Brooks, and would not know if DTE made an error. She further testified that in her job, she does not tell customers the reason for the finding of unauthorized use.

In redirect testimony, she testified that she is not aware of any instances where unauthorized use is not equivalent to theft.<sup>101</sup> She acknowledged that when customers ask about unauthorized usage, she will tell them that DTE considers it theft.<sup>102</sup>

#### 4. Ms. Adkins

Ms. Adkins works in ID Fraud Investigations department as an ID Fraud Telephone Specialist, a position she has held for one month. Before that, she was a Business Office Interviewer under the Revenue Management and Protection department.

She testified that she generates records for every person she speaks with.<sup>103</sup> She identified Exhibit R-13 as a company record, and also Exhibit C-2, which she characterized as a screen shot of the customer notes system.<sup>104</sup> She testified that the communications in Exhibit C-2 do not reflect different treatment from other customers. Ms. Adkins testified that Ms. Brooks’ electric service had been terminated and bills were not being generated.

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<sup>100</sup> See 4 Tr 320.

<sup>101</sup> See 4 Tr 327.

<sup>102</sup> See 4 Tr 328.

<sup>103</sup> See 4 Tr 336.

<sup>104</sup> See 4 Tr 335.

Ms. Adkins testified that she did not accuse Ms. Brooks of theft. She testified that the Energy Resolution department is also called the Revenue Recovery department, and may also be referred to as the Theft department.

In her supplemental testimony, she stated that a person must be an active customer of DTE to be offered a payment plan, whereas in the case of unauthorized use, there is no active customer account.<sup>105</sup> She also testified that a customer's income is not taken into account if there is unauthorized usage.<sup>106</sup>

In her testimony on cross-examination, Ms. Adkins testified that she does not know why her note says "requested by Revenue Protection" because she does not work in that department and her notes should just say "customer care." She also stated that she used the term "unauthorized usage" when speaking to Ms. Brooks, rather than "theft," but she understands the terms to be the synonymous<sup>107</sup>. While she seemed to acknowledge that unauthorized use can occur when a customer does not do anything wrong, she testified that she would not know what the unauthorized use is, or whether Ms. Brooks engaged in unlawful activity.<sup>108</sup>

In her redirect testimony, she again addressed her note in Exhibit C-2, indicating that she prepared the note, but must have made an error to generate the "requested by revenue protection" code. She testified that "Revenue Protection" is the organization she works under, and Revenue Recovery is the Unauthorized Usage department. She also confirmed that she spoke to Ms. Brooks on December 12, 2014.

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<sup>105</sup> See 4 Tr 340-341.

<sup>106</sup> See 4 Tr 341.

<sup>107</sup> See 4 Tr 344-345.

<sup>108</sup> See 4 Tr 345-346.

#### 5. Ms. Watkins

Ms. Watkins is an Executive Customer Consultant in the Executive Consumer Affairs Center of Consumers Energy. She explained that she resolves escalated complaints and inquires referred by the MPSC.<sup>109</sup> She disputed Ms. Hawkins' testimony at 4 Tr 161 that she refused to set up a meeting. She testified that she told Ms. Hawkins that Ms. Brooks would need to contact the Theft department, also known as the Energy Resolution department, "when she is ready to make payment." Ms. Watkins testified that she told Ms. Hawkins that a theft specialist will bill Ms. Brooks' account at the time of the call, and once payment is made, she will need to contact the customer care department to place an order to restore the electricity.<sup>110</sup> Ms. Watkins also testified that she was not able to issue a bill because bills are only generated when the party responsible for such usage has communicated their agreement to make full payment.<sup>111</sup>

#### 6. Mr. Skotzke

Mr. Skotzke is a Theft Billing Specialist for DTE. He presented the calculations underlying the approximately \$7,000 estimated payment DTE believes Ms. Brooks should pay. He testified that it is not the company's practice to provide bills for unauthorized usage until the customer is ready to pay for that usage.<sup>112</sup> He explained that DTE will estimate usage based on meter readings, if they are available, but only provides an estimate until a customer is ready to pay. He presented his "Theft Billing

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<sup>109</sup> See 5 Tr 359.

<sup>110</sup> See 5 Tr 360.

<sup>111</sup> See 5 Tr 360-361.

<sup>112</sup> See 4 Tr 291-292.

Estimate” in Exhibit R-14, showing \$6,932.71 as the amount of electric service DTE believes Carol Brooks received.<sup>113</sup>

In his supplemental testimony, he further testified that there is no “delinquent account” in a case of unauthorized usage. He defined “unauthorized usage” as occurring when a customer’s service is disconnected and then turned back on by someone other than DTE.<sup>114</sup> Mr. Skotzke took issue with Ms. Brooks’ testimony that she disputed an “alleged bill” prior to January 6, 2015, asserting that because there is no person associated with the account, there is no “bill.”<sup>115</sup>

Mr. Skotzke was also cross-examined on his testimony. He explained that his job is to determine the amount due in cases of theft, which he defines as “the diversion of service,” or “unlawfully obtaining service.”<sup>116</sup> He initially agreed that unauthorized use could be DTE making a mistake in its billing procedures.<sup>117</sup> He then testified that he uses “theft” and “unauthorized use” interchangeably.<sup>118</sup> He also acknowledged that he never went to Ms. Brooks’ residence.<sup>119</sup> He also stated that DTE requires unauthorized use charges to be paid up front, even if its DTE’s error.<sup>120</sup>

C. Complainant’s rebuttal and cross-examination

Ms. Brooks presented rebuttal testimony by herself, her sister, and Mr. Taylor. She and her sister were also cross-examined.

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<sup>113</sup> See 4 Tr 293.

<sup>114</sup> See 4 Tr 295.

<sup>115</sup> See 4 Tr 296.

<sup>116</sup> See 4 Tr 297-298.

<sup>117</sup> See 4 Tr 299.

<sup>118</sup> See 4 Tr 302.

<sup>119</sup> See 4 Tr 303.

<sup>120</sup> See 4 Tr 303.

1. Ms. Brooks

Ms. Brooks testified that she does not remember that her electric service was disconnected on December 6, 2007, or remember receiving the shutoff notice in Exhibit R-2 in late 2007.<sup>121</sup> She testified that she was receiving assistance from MDHHS at the time. She testified that Exhibit R-4 does not indicate that she needed to pay \$451.35 to avoid shutoff, as Ms. Robinson's initial testimony stated, before Ms. Robinson corrected her testimony on the witness stand. Ms. Brooks also reviewed the information on Exhibit R-4, testifying that it states two different amounts to avoid shutoff (\$202.03 and \$326.69) and does not identify the August 24, 2009 shutoff date Ms. Robinson testified to. Instead, she testified that the only date mentioned for payment is September 8, 2009.<sup>122</sup> Ms. Brooks testified that payment of \$326.69 was made on September 3, 2009. She further testified that no one from DTE contacted her between August 14, 2009 and August 31, 2009, or afterward. In her view, there was no reason for her to call DTE during that time period because there was no service interruption and her bill was paid on September 3, 2009.<sup>123</sup> Ms. Brooks testified that she continued to receive monthly bills. She also testified that she was taking care of her 14-year-old son during this time period, who was injured in a car accident in May 2009.<sup>124</sup>

Ms. Brooks also disputed Ms. Robinson's claim that she was told what she needed to do to restore her electric service in 2015. She testified that she never spoke to Ms. Robinson, but was told by DTE employees that she had no option other than to make the \$7,000 payment.

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<sup>121</sup> See 4 Tr 131-132.

<sup>122</sup> See 4 Tr 134-135.

<sup>123</sup> See 4 Tr 136.

<sup>124</sup> See 4 Tr 136-137.

She testified that on her December 8, 2014 visit to DTE offices, she met Ms. Reid, who would not tell her the exact amount to pay. She testified that Ms. Reid was aware she was a low-income customer, and Ms. Reid told her the State assistance agency would not assist her with “theft charges.”<sup>125</sup> Ms. Brooks stated that Ms. Reid made clear that she thought Ms. Brooks had stolen electricity. Ms. Brooks testified that she did not steal electric service, and expressed her concern that no one would believe her or provide her with any documentation.<sup>126</sup> She testified that on many occasions she advised DTE that the amount it was claiming was in dispute and that she wanted documentation. She also stated that she told DTE that she did not steal electricity on multiple occasions.<sup>127</sup> She further stated that DTE never told her she had the right to file a complaint, or a right to an informal hearing.<sup>128</sup> She stated DTE also told her it did not make appointments, and further objected that DTE never contacted her in response to any of her visits, calls, or her written complaint.

Ms. Brooks reiterated that she did not know she was not being billed for electric service after August 2009.<sup>129</sup> She testified that her bills did not always contain a statement of electric and gas charges separately, also reiterating that her electric service was not disconnected in August 2009.

Ms. Brooks also addressed prefiled testimony of Mr. Stanley, which DTE subsequently did not offer. She testified that she was not told he would be coming and did not know he was there; she also testified that DTE did not send her a copy of the

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<sup>125</sup> See 4 Tr 137-138.

<sup>126</sup> See 4 Tr 139.

<sup>127</sup> See 4 Tr 140.

<sup>128</sup> See 4 Tr 141.

<sup>129</sup> See 4 Tr 143.

results of his investigation for months.<sup>130</sup> She testified that the investigation showed there was no theft. Regarding the notation in his report about dogs in the yard, she testified that she did have one dog in 2015, and has never had more than one dog. Further, she testified that he never contacted her to remove the dog.<sup>131</sup> She also took issue with the explanation in Mr. Stanley's prefiled testimony regarding the reason he was sent to the property.<sup>132</sup> She testified to her opinion that the investigation was prompted by her counsel's October 22, 2015 email to DTE's counsel requesting documentation of the company's claim. Finally, Ms. Brooks described the physical, mental, and emotional difficulties she attributes to DTE's conduct.<sup>133</sup>

DTE cross-examined Ms. Brooks briefly, asking about her age and whether she had received service from any other utility.<sup>134</sup> She clarified in redirect testimony that she had never claimed that she was entitled to "senior" status, but sought protections available to low-income customers.<sup>135</sup>

## 2. Ms. Hawkins

Ms. Hawkins also provided limited rebuttal testimony. She addressed the prefiled testimony of Mr. Trousdale,<sup>136</sup> stating that she did not talk to him on December 5, 2014, and that she does not work for Michigan Property Management.

DTE cross-examined Ms. Hawkins principally regarding the management and sale of the property. She identified the quit claim deed she executed for the sale of the property, and identified the tenant who occupied the second-floor unit until

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<sup>130</sup> See 4 Tr 143.

<sup>131</sup> See 4 Tr 144.

<sup>132</sup> See 4 Tr 145.

<sup>133</sup> See 4 Tr 146-150.

<sup>134</sup> See 4 Tr 153-154.

<sup>135</sup> See 4 Tr 155.

<sup>136</sup> Ms. Hawkins clearly meant to refer to Mr. Trousdale's testimony here, although she referred to Mr. Stanley, but it is a minor point.

December 2014. She testified that electrical work was performed at the second-floor unit after the tenant vacated, arranged by Michigan Property Managers, which manages the property for her. Exhibit R-18 pertains to that electrical work; Exhibit R-19 pertains to some additional maintenance work to protect the pipes in that unit from freezing. In her redirect testimony, she stated that Mr. Taylor, a witness for Complainant in this case, performed the electrical work.<sup>137</sup>

### 3. Mr. Taylor

Mr. Taylor's rebuttal testimony was bound into the record without cross-examination. Mr. Taylor is a master electrician and owner of DDC Electric.<sup>138</sup> He testified that he was called to look at the wiring at the property around December 2014, presenting his invoice dated February 18, 2015 as Exhibit C-16. He testified that he looked at the outside meters, and that one meter had a lock on it. He testified that he looked at the wires leading to the meter, which he described as looking fine except that one wire was exposed. He testified that the wires were all connected to the meter and had not been disconnected or cut.<sup>139</sup> He testified that the outside meter panels both had unbroken seals, blue or green. Regarding the time of his visit, he testified that if DTE cut the drip loop on January 6, 2016, his visit was before then because the wires had not been cut when he visited the property.<sup>140</sup> He testified that he then went down to the basement and looked at the meter panels. He testified that there was electrical service to both units, with less electricity in the lower unit. He testified that some wires had been attached to the wrong meter panel, which he concluded allowed the

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<sup>137</sup> See 4 Tr 185.

<sup>138</sup> See 4 Tr 190.

<sup>139</sup> See 4 Tr 190.

<sup>140</sup> See 4 Tr 191.

second-floor tenant to take electricity from the first-floor meter. He disconnected the improper wires from the first-floor meter and reconnected them to the second-floor meter where they belonged.<sup>141</sup> He testified that after this, all the electricity was restored to the lower unit.

Mr. Taylor testified that he did not observe evidence of backfeed, but he would have needed to get into the meters to make a definitive conclusion, which he was not able to do. He stated, however, that the improper wiring he observed and corrected would not have caused a backfeed.<sup>142</sup> Mr. Taylor explained that a backfeed is usually created by accident, when someone crosses a wire, and does not mean theft occurred. He also testified that if there was a backfeed, and power to the first floor was shut off, the power from the second floor would provide electricity to the first floor.<sup>143</sup> Thus, Mr. Taylor concluded, if there was a backfeed as of January 6, 2015, the first floor would not have lost all of its power. Mr. Taylor also testified that DTE could have concluded there was a backfeed, when there was not a backfeed, if there was a “residual on the neutral”.<sup>144</sup> He testified that nothing can be done about this residual and it is not dangerous. He also testified that DTE would not have installed the new meters at the property if there was a backfeed. He explained that backfeed is dangerous, because electricity runs to the meter, i.e. the wrong way, and that DTE should check for it whenever it disconnects a meter. He testified that backfeed will not cause a disconnected meter to register use.

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<sup>141</sup> See 4 Tr 192.

<sup>142</sup> See 4 Tr 193.

<sup>143</sup> See 4 Tr 194.

<sup>144</sup> See 4 Tr 195.

Mr. Taylor testified that after he fixed the wires from the second floor, he told the tenant to contact DTE to open the outside meter box so he could see if any other wires were attached to the wrong panel. He explained that he would do this by turning one meter off to see if anything on that floor was still on, which would show something was connected to the wrong panel. Mr. Taylor testified that he did not see anything showing either tenant was stealing anything from DTE.<sup>145</sup> He also explained the procedures used when meters are disconnected. Finally, Mr. Taylor addressed Mr. Trousdale's testimony that he put in a work order to fix exposed wires on December 5, 2014. Mr. Taylor testified that it did not appear to him that the wires were fixed, and that the wires were still exposed as of August 1, 2016 when he was back at the property.

D. Stipulation

As discussed on the record, and formalized in a February 13, 2017 filing, the parties stipulated to the following facts, in resolution of an evidentiary dispute and DTE's motion to supplement the record:

1. DTE Electric's Credit and Collection Management Services Account History in Collection records ("Collection Records") track a customer's account through the collection process. The Collection Records for Carol Brooks' account indicate that DTE Electric's Interactive Voice Response system made phone calls on June 29, 2009 at 11:07:20, July 8, 2009 at 11:09:43, and July 9, 2009 at 11:12:58.
2. DTE Electric's Collection Records for Carol Brooks' account indicate that "Customer Hung Up" in regards to the July 8, 2009 and July 9, 2009 calls.
3. DTE Electric's Collection Records for Carol Brooks' account indicate that "Dialer Left Message" in regards to the June 29, 2009 call.
4. DTE Electric's Collection Records for Carol Brooks' account do not list the phone number that was dialed.

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<sup>145</sup> See 4 Tr 196.

5. DTE Electric's Collection Records do not show what was said during the June 29, 2009, July 8, 2009, and July 9, 2009 calls.

### III.

#### **POSITIONS OF THE PARTIES**

Before addressing the specific factual and legal disputes between the parties, the arguments presented in the briefs and reply briefs are reviewed below, beginning with the initial briefs.

##### A. Complainant's Brief

Ms. Brooks argues that DTE unjustly accused her of stealing electric service, shut off her electricity without notice and with no opportunity for an informal hearing, demanded full payment with no justification and no recognition of her low-income status, and refused to reconnect her service for over a year. Complainant takes issue with what she characterizes as DTE's policy not to send shutoff notices in the case of unauthorized use and DTE's policy to require full payment before it will restore service. Complainant also argues that customers accused of unauthorized use "are instructed that they are prohibited from seeking assistance from agencies that help low-income customers."<sup>146</sup>

Complainant cites Consumers Energy's shutoff notice, Exhibit C-17, which provides customers with the name of an investigator to contact, provides the date of disconnection, and provides the customer with a procedure to dispute the unauthorized use charges, and notifies them that service will not be shut off pending resolution of a complaint; it also instructs the customer to contact a social service agency if they

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<sup>146</sup> See Brooks brief page 4, citing Reid, 4 Tr 318.

believe they might be eligible for emergency assistance.<sup>147</sup> Complainant argues that not only does DTE not apprise customers of these rights and procedures, but affirmatively tells customers these rights are not available to them.

Specifically addressing the events of 2014 and 2015, Ms. Brooks argues that DTE never conducted a theft investigation before concluding that she had engaged in unauthorized use. She argues that Mr. Trousdale had not been sent to the Monica property to conduct a theft investigation and is not a trained investigator.<sup>148</sup> She cites Ms. Trousdale's own testimony that he assumed a theft investigation had been conducted by someone else.<sup>149</sup> Ms. Brooks next reviews her efforts to resolve the allegation that she had not been paying her electric bill.<sup>150</sup> She argues:

From December 5, 2014 to January 6, 2015, Brooks and/or her sister made at least two calls to DTE and 2 personal visits to its office to attempt to restore heat to her home. However, due to DTE's policies regarding "unauthorized usage", Brooks was not permitted to inspect any documentation, was never sent a bill or a shutoff notice, and was not given any opportunity to object to DTE's allegations.<sup>151</sup>

She next reviews the record evidence regarding Ms. Brooks' efforts to restore her service following the January 6, 2015 shutoff through the date she filed her complaint in this case, including the efforts of her attorney.<sup>152</sup> Acknowledging that her electric service was restored on February 24, 2016, Ms. Brooks notes that DTE has sent additional shutoff notices after that date, with no explanation, citing Exhibit C-22.

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<sup>147</sup> See Brooks brief, page 5.

<sup>148</sup> See brief, pages 5-6, citing 4 Tr 212-214.

<sup>149</sup> See Brooks brief, page 6, citing 4 Tr 216.

<sup>150</sup> See Brooks brief, pages 6-9.

<sup>151</sup> See Brooks brief, pages 6-7.

<sup>152</sup> See Brooks brief, pages 9-11.

In her legal analysis, Ms. Brooks cites *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978), which she also attaches to her brief, arguing that due process requires notice prior to shutting off a utility service.<sup>153</sup>

Ms. Brooks then addresses the specific allegations of her complaint, beginning with MCL 460.9q. She argues that DTE was not permitted to shut off service on January 6, 2015, because she did not engage in unauthorized use. She argues that DTE has expanded the definition of unauthorized use to include situations in which DTE itself has failed to bill a customer due to its own error. Addressing MCL 460.10t and R 460.143, Complainant argues that she is a low-income customer entitled to the protections of this statute and should not have had her electric service disconnected in the middle of the winter.<sup>154</sup>

Addressing R 460.106, Complainant argues that even if DTE believed that Ms. Brooks engaged in unauthorized usage, it was not allowed to deny her service under the terms of this rule:

Pursuant to R 460.106, Brooks called DTE and personally visited DTE's office on two occasions in December 2014 regarding the continuation of her electric service. Pursuant to R 460.106, Brooks provided proof of identification to DTE. Brooks was not required to pay a deposit to DTE because she did not engage in unauthorized use. Furthermore, DTE failed to provide any notice or opportunity for a hearing regarding the disputed \$7,000.00 fee for purported "unauthorized use". Despite the fact that Brooks had properly requested continuation of her service, DTE refused to continue electric service for Brooks unless she paid DTE \$7,000.00.<sup>155</sup>

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<sup>153</sup> See Brooks brief, pages 12-14.

<sup>154</sup> See Brooks brief, pages 17-19.

<sup>155</sup> See Brooks brief, page 20.

Addressing R 460.126, Complainant argues that this section limits DTE's ability to backbill customers:

Brooks has never engaged in "unauthorized use of utility service". Therefore, to the extent Brooks owed DTE anything for unbilled usage, DTE was limited to backbilling Brooks for the 12-month period immediately preceding discovery of its billing error. Contrary to R 460.126(2)(b), DTE demanded Brooks pay charges that DTE alleges she incurred for a period of over 5 years. Furthermore, DTE refused to allow Brooks to enter a payment plan to pay off any purported arrearage and failed to take into consideration the fact that Brooks was a low-income customer.<sup>156</sup>

Addressing R 460.138 and R 460.141, which speak to the notice required prior to a shutoff, Ms. Brooks argues that DTE failed to follow these requirements in disconnecting service on January 6, 2015, because DTE failed to provide prior notice, failed to send a notice of shutoff to the address, and failed to leave a notice at the premises following the January 6, 2015 shutoff.<sup>157</sup>

Addressing R 460.151, R 460.152, and R 460.163, Ms. Brooks argues that DTE failed to investigate her complaint promptly as required, and wrongly disconnected her service when it knew that its claim that she engaged in unauthorized use was in dispute.<sup>158</sup>

Addressing R 460.144(2), Complainant argues that DTE failed to promptly restore Ms. Brooks' electricity, pointing to the five-day time period between the date DTE agreed to restore her service and the date it was actually restored.

The Complainant seeks remedies and penalties under MCL 460.10c, including attorney fees, and in addition asking that the Commission prohibit DTE from collecting any of the approximately \$7,000 it claims Ms. Brooks is owed, issue a cease and desist

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<sup>156</sup> See Brooks brief, page 21.

<sup>157</sup> See Brooks brief, page 22.

<sup>158</sup> See Brooks brief, page 22-24.

order requiring DTE to cease and desist from shutting off its customers' utility service without providing a shutoff notice, and provide any additional relief the Commission finds appropriate.

B. DTE's Brief

In its initial brief, DTE argues that Ms. Brooks ceased to be a "customer" of DTE beginning August 31, 2009, when DTE contends her electric service was disconnected for nonpayment, citing Exhibit R-5.<sup>159</sup> Reviewing the account history leading up to August 31, 2009, DTE argues that Ms. Brooks carried a past-due balance on her account throughout much of 2009.<sup>160</sup> DTE notes that Ms. Brooks made a partial payment of \$100 in June 2009, and did not make another payment until the September 3, 2009 payment. DTE points to the June 19, 2009 bill, that containing a shutoff notice:

At the top of the bill, also in red font, are the words "AVOID SHUTOFF PAY \$245.05 BEFORE 07/06/2009." The important information section of the bill set forth what Ms. Brooks was to do if she wanted to avoid shutoff, it presented options for payment, and notified her of her hearing rights among other things. See Exhibit R-4. Ms. Brooks made no payment. Exhibit R-1.<sup>161</sup>

DTE points to the July 22, 2009 bill also containing a shutoff notice:

This time the notice stated that Ms. Brooks' account remained in shutoff status due to non-payment and instructed her to "[p]lease pay \$323.75 now" in bold red font. There was no date listed for payment of the past due amounts because Ms. Brooks' account was in shutoff status. Therefore, payment was due immediately as stated on page two of the bill. 4 T 240. Exhibit R-4. The important information section advised Ms. Brooks of her rights and responsibilities regarding shutoff. Again, Ms. Brooks did not make a payment. Exhibit R-1.<sup>162</sup>

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<sup>159</sup> See DTE brief, pages 3-4.

<sup>160</sup> See DTE brief, pages 3-4.

<sup>161</sup> See DTE brief, page 4.

<sup>162</sup> See DTE brief, page 4 (footnote omitted).

Turning to the August 14, 2009 bill, DTE argues that it contained “yet another shutoff notice instructing her, in bold red font, to ‘pay \$326.69 now’ as her account remained in shutoff status.”<sup>163</sup> DTE then argues: “No payment was received on the account after the shutoff notice was sent, and company records indicate that Ms. Brooks’ electric and gas service were disconnected on August 31, 2009.”<sup>164</sup>

DTE then asserts that: “Ms. Brooks received a bill for electric and gas service in September 2009 that included usage for electric service from August 14, 2009 through August 31, 2009.”<sup>165</sup> In a footnote, DTE acknowledges: “Ms. Brooks’ gas service was also noted in Company records as being disconnected on August 31, 2009, however, no information was provided for the final meter read, and gas service continued to be provided to the first floor of the Monica Property and billing proceeded as normal. 4 T 229-230, Exhibit R-5.”<sup>166</sup> DTE argues that Ms. Brooks’ bills were substantially lower after DTE stopped billing her for electric service: “In total, Ms. Brooks received 62 bills that contained no charges for electric service, yet she continued to take electric service throughout that same period. Not once did Ms. Brooks contact DTE Electric to inquire about charges for the electric service that she continued to receive. 4 T 231.”<sup>167</sup> Based on the calculations presented in Exhibit R-14, DTE asserts that Ms. Brooks owes DTE \$6,932.71.

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<sup>163</sup> See DTE brief, page 4.

<sup>164</sup> See DTE brief, page 5.

<sup>165</sup> See DTE brief, page 5.

<sup>166</sup> See DTE brief, page 5 at n3.

<sup>167</sup> See DTE brief, page 5.

DTE also contends that Ms. Brooks' service was disconnected in 2007, citing company records, although Ms. Brooks did not recall this:

The electric service to the Monica Property was also disconnected on December 6, 2007 for nonpayment. 4 T 228, Exhibits R-2, R-3. Ms. Brooks contacted the Company the following day to request restoration of service and pay the past due balance. A restoration order was generated, but the field personnel dispatched to the property on December 10, 2007 was unable to enter the yard due to the presence of a pitbull dog and no answer at the home. 4T 229. Ms. Brooks contacted the Company again on December 17, 2007 to request restoration, but when the DTE Electric field representative arrived at the Monica Property the next day (December 18<sup>th</sup>) he noted that the electric meter was already on and active. 4 T 229, Exhibit R-3.<sup>168</sup>

Turning to 2014, DTE argues that Ms. Brooks' use of electric service was "discovered" on December 5, 2014, when Mr. Trousdale visited the property to turn service on to the second floor.<sup>169</sup> DTE's brief also reviews record evidence regarding the communications between DTE and Ms. Brooks following Mr. Trousdale's visit on December 5, 2014, and leading to the ultimate restoration of service on February 24, 2016.

DTE argues that the applicable evidentiary standard generally requires the Complainant to bear the burden of proof. DTE argues that Complainant must meet her burden of proof using the preponderance of the evidence standard.<sup>170</sup> DTE then argues that the central issue in this case is whether Ms. Brooks' usage of electricity for over five years without paying for it is unauthorized use of utility service. DTE acknowledges that Ms. Brooks' meter continued to register usage after August 2009, but asserts that the company reads all meters regardless of service status.<sup>171</sup> DTE argues that Ms. Brooks

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<sup>168</sup> See DTE brief, page 7.

<sup>169</sup> See DTE brief, pages 3, citing Mr. Trousdale's testimony.

<sup>170</sup> See DTE brief, pages 9-10.

<sup>171</sup> See DTE brief, page 10, at n5.

was not billed for use during this period because “there was no active customer agreement for electric service after her disconnection in 2009.” To DTE, that Ms. Brooks received approximately \$7,000 in electric service and never once contacted DTE Electric to inquire about charges for that service “falls squarely within the definition of unauthorized use of utility service.”

Addressing the definition of unauthorized use of utility service, DTE argues that R 460.102(ss) does not limit “unauthorized use” to criminal or unlawful acts, citing the rule language “including but not limited to.”<sup>172</sup> To DTE, unauthorized use can include “any instance where a customer takes service without paying for it.” In support of its position, DTE argues that civil claims can be brought for actions which are not prosecuted as criminal or unlawful. DTE references the tort of conversion as a “distinct act of dominion wrongfully exerted over another’s personal property in denial of or inconsistent with his rights therein.”<sup>173</sup> DTE argues that Ms. Brooks wrongfully used DTE’s electric service from September 2009 through December 2014 without paying for it. DTE argues: “Electric service is not a good in the commercial sense, but if it were, then DTE Electric would have a conversion claim against Complainant and be entitled to treble damages pursuant to MCL 600.2919a(1).”<sup>174</sup> Thus, DTE argues, Ms. Brooks engaged in “unauthorized use of utility service,” not rising to the level of “outright theft.” Further, DTE argues:

In Ms. Brooks’ case, there was ample opportunity to review any of the 60 plus bills she received for gas service and notice that she was not being charged for electric service. Continuing to accept electric service without even attempting to pay for it is unauthorized use. Such an interpretation is

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<sup>172</sup> See DTE brief, page 11.

<sup>173</sup> See DTE brief, page 11, *citing Aroma Wines & Equip, Inc v Columbian Distrib Servs, Inc*, 497 Mich 337, 346 (2015).

<sup>174</sup> See DTE brief, page 12.

appropriate given the billing rule's use of the language "including but not limited to..." See Commission Rule R 460.102(ss).<sup>175</sup>

DTE then argues that because Ms. Brooks engaged in unauthorized use, DTE was not obligated to provide notice prior to disconnecting her service.

Specifically addressing Count I of the Second Amended Complaint, which cited MCL 460.9q, DTE argues that Ms. Brooks was not a "customer" of DTE. DTE cites R 460.102(k), which defines customer as "a purchaser of electricity or natural gas that is supplied or distributed by a utility for residential purposes." DTE argues that "purchaser" means "to acquire by paying valuable consideration," while Ms. Brooks "never paid, or even offered to pay for the roughly \$7,000 in electric service she acquired."<sup>176</sup> DTE argues on this basis that Ms. Brooks was not entitled to notice under MCL 460.9q.

Addressing the December 5, 2014 visit, when Mr. Trousdale turned off breakers, DTE argues that it was not responsible for Ms. Brooks' furnace no longer working, because she could have turned the breakers on at any time.<sup>177</sup>

Specifically addressing Count II of the Second Amended Complaint, which cites MCL 460.10t, and R 460.148(1) which is cited in Count X, DTE disputes that it shut off service to an "eligible low-income customer". DTE argues that DTE's records did not identify Ms. Brooks as an eligible low-income customer:

It is the customer's responsibility to notify DTE Electric of their low income status unless they have received a State of Michigan Energy Draft (Home Heating Tax Credit), a Michigan Department of Human Services ("MDHS") payment, or a low income payment from a non-profit agency within a 12-month timeframe such that it is reflected in Company records. As of December 6, 2014 Ms. Brooks had not advised DTE Electric that she was

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<sup>175</sup> See DTE brief, page 12.

<sup>176</sup> See DTE brief, pages 12-13.

<sup>177</sup> See DTE brief, page 13.

a low income customer, and because no account existed for the first floor of the Monica Property, no low-income payments had been received that would indicate that she was an eligible low income customer.<sup>178</sup>

DTE also argues that the evidentiary record in this case does not show that Ms. Brooks was a low-income customer, only that she is currently a low-income customer.<sup>179</sup> DTE also makes the argument, discussed above, that Ms. Brooks was not a “customer” of DTE as of December 5, 2014 or January 6, 2015. DTE responds explicitly to Complainant’s demand for damages by arguing that any damages shown on this record are speculative.<sup>180</sup>

Specifically addressing Court III of the Second Amended Complaint, which alleges a violation of R 460.106, DTE argues that Ms. Brooks conflates an “alleged delinquent account” within the meaning of the rule with “unauthorized use.” To DTE, there was never a delinquent account because Ms. Brooks was not a customer of record.<sup>181</sup>

Specifically addressing Count IV of the Second Amended Complaint, which alleges a violation of R 460.126, DTE argues that no payment plan need be offered under the rule in cases of unauthorized usage.<sup>182</sup>

Specifically addressing Count V of the Second Amended Complaint, which alleges a violation of R 460.138, DTE again argues that this rule requiring a shutoff notice does not apply because Ms. Brooks was not a “customer” of DTE at the time of

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<sup>178</sup> See DTE brief, page 1, citing 4 Tr 235-236.

<sup>179</sup> See DTE brief, page 14.

<sup>180</sup> See DTE brief, page 15.

<sup>181</sup> See DTE brief, page 16.

<sup>182</sup> See DTE brief, pages 16-17.

disconnection. DTE emphasizes that it does not provide notice in cases of unauthorized usage.<sup>183</sup>

Specifically addressing Counts VI and VII, alleging violations of R 460.141, DTE argues that it followed the notice procedures required by the rule in August of 2009, and argues that no notice was required when service was disconnected in 2015, because Ms. Brooks engaged in unauthorized use and was not a customer of DTE.<sup>184</sup> DTE also argues that it did not disconnect service knowing that the claim was in dispute: “Ms. Brooks has not alleged that she presented any evidence to any DTE Electric employee at the Monica Property on January 6, 2015 that she was disputing the unauthorized use charges.”<sup>185</sup>

Specifically addressing Count VIII, DTE argues that R 460.144 does not apply in cases when service is disconnected for unauthorized use, because that is not considered an “involuntary shutoff”. DTE argues no telephone contact was necessary in 2015 because there was no customer of record, and there was no “delinquent account.”<sup>186</sup>

Addressing Count IX, alleging a violation of R 460.144(2), DTE argues that it was not “required” to restore service to the property in 2016, but did so voluntarily, so the rule is not applicable. DTE also argues that a windstorm delayed completion of the reconnection order.<sup>187</sup>

Addressing Counts XI through XIII, alleging violations of R 460.151, 460.152, and 460.163, DTE again argues that these rules also do not impose any obligation on DTE

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<sup>183</sup> See DTE brief, pages 16-17.

<sup>184</sup> See DTE brief, pages 17-18.

<sup>185</sup> See DTE brief, page 18.

<sup>186</sup> See DTE brief, page 18-19.

<sup>187</sup> See DTE brief, page 19.

to notify customers of the right to dispute a bill, because Ms. Brooks was not a customer of DTE.

By way of relief, DTE requests that the Second Amended Complaint be dismissed in its entirety with prejudice.

C. Brooks' Reply Brief

In her reply brief, Ms. Brooks disputes that she has “refused” to pay for utility service, arguing that DTE presented no evidence in support of its claim.<sup>188</sup> She cites record evidence to show that she repeatedly requested information regarding the amount that DTE claimed she owed, citing Exhibits C-4 and C-5. Characterizing as “extortionate” DTE’s demand that Ms. Brooks pay \$7,000 at one time, Ms. Brooks argues that Ms. Brooks is a low-income customer without the personal financial means to pay \$7,000 at one time. Complainant argues that “inability to pay is not the equivalent of a ‘refusal’ to pay.”<sup>189</sup> Additionally, Complainant argues that it was not until she filed a formal complaint that she discovered that DTE does not have any authority to collect the amounts it claimed she owes.<sup>190</sup>

Ms. Brooks’ reply brief also revisits the issue of unauthorized use, arguing as she did in her initial brief that she did not engage in “unauthorized use.”<sup>191</sup> She further argues that even in cases of “unauthorized use” DTE is required to send shut-off notices.<sup>192</sup> Complainant cites the language of MCL 460.9q, and also argues that R 460.106 addresses requests for service from new or previous customers, and only permits DTE to refuse service to a previous customer who engaged in unauthorized use

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<sup>188</sup> See Brooks reply brief, page 2.

<sup>189</sup> See Brooks reply brief, page 3.

<sup>190</sup> See Brooks reply brief, page 3-4.

<sup>191</sup> See Brooks’ reply brief, pages 4-9.

<sup>192</sup> See Brooks reply brief, pages 9-10.

if the “finding of unauthorized use . . . was made after notice and an opportunity for a hearing and is not in dispute.”<sup>193</sup> Complainant argues:

Therefore, DTE’s claim that it does not need to afford customers that it accuses of “unauthorized use” any protections, is contrary to the law and the regulations. DTE’s claim regarding the lack of protections it affords the customers that it accuses of “unauthorized use” is especially concerning because DTE has also impermissibly expanded the definition of “unauthorized use” to include cases in which the unbilled use is the result of an error by DTE.<sup>194</sup>

D. DTE Reply Brief

In its reply brief, DTE argues that the Complainant’s definition of unauthorized use violates principles of statutory construction, again focusing on the language “including but not limited to”. DTE also argues that the testimony of DTE witnesses is not relevant to an understanding of the term, since they are not attorneys. It then argues:

If anything, the testimony provided by these witnesses shows that unauthorized use has a broad definition, which is consistent with DTE Electric’s interpretation of the above statute and Commission rule defining “unauthorized use.” Ms. Adkins acknowledged that unauthorized use can mean theft, but it does not always. 4 T 345-346. Mr. Skotzke also testified that he understood the terms theft and unauthorized use to be distinct. 4 T 299.<sup>195</sup>

DTE argues that that accepting Ms. Brooks assertion that she did not know that she was not being billed for electric service “requires the Commission to be convinced that *not once in over five years* (62 billing statements) did Ms. Brooks review her utility bill, which in that timeframe showed only gas service charges.”<sup>196</sup> DTE argues that “Ms. Brooks contrived assertion that she did not know that she was not being billed for

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<sup>193</sup> See Brooks reply brief, page 10.

<sup>194</sup> See Brooks reply brief, page 10.

<sup>195</sup> See DTE reply brief, page 4.

<sup>196</sup> See DTE reply brief, pages 4-5 (emphasis in original).

electric service strains credulity.”<sup>197</sup> DTE then makes more explicit the suggestion in its initial brief that Ms. Brooks was somehow responsible for turning on her own service:

Moreover, while DTE Electric is not asserting that Ms. Brooks herself engaged in any illegal activity with respect to the meter, when DTE Electric witness Mr. Trousdale inspected the first floor meter at the Monica Property he noticed that the seal typically applied by the Company after accessing the meter was missing. 4 T 207, 215. This is not the first instance at the Monica Property where the meter was on and registering usage after DTE Electric disconnected service and without Company records showing that DTE Electric personnel had turned the meter back on. A similar observation was made in 2007 after Ms. Brooks’ electric service was disconnected for non-payment. Upon returning to the Monica Property, Company personnel observed that the meter had already been turned on, but DTE Electric records show that the Company personnel originally dispatched to restore service could not access the yard. 4 T 228-229, Exhibit R-3.<sup>198</sup>

DTE also reiterates its argument that Ms. Brooks was not a customer after August 2009, and disputing that it had any obligations to her under applicable statutes or rules on that basis.<sup>199</sup> DTE argues:

Accordingly, the requirements of MCL 460.9q, MCL 460.10t, R 460.138, R 460.141(1), R 460.141(3), R 460.141(7), R 460.148(1), R 460.151 were not applicable to Ms. Brooks. Thus, Ms. Brooks is not entitled to the statutory protections afforded to a “customer” when she is unwilling to perform the obligations (i.e. pay for service) of a “customer.”<sup>200</sup>

DTE also takes issue with the Complainant’s claim that DTE did not leave a notice at Ms. Brooks’ home on January 6, 2015.<sup>201</sup> DTE also disputes the applicability of *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978).<sup>202</sup> DTE argues that by complying with its shutoff notice procedures, it satisfied the due process requirements

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<sup>197</sup> See DTE reply brief, page 5.

<sup>198</sup> See DTE reply brief, pages 5-6.

<sup>199</sup> See DTE brief, pages 6-8.

<sup>200</sup> See DTE reply brief, page 7.

<sup>201</sup> See DTE reply brief, pages 7-8.

<sup>202</sup> See DTE reply brief, pages 8-9.

recognized by the U.S. Supreme Court in this case. DTE argues that those procedures do not require a shutoff notice to someone who is not a customer of record.

Specifically regarding R 460.106, DTE argues that because it voluntarily turned on service in February of 2016, without requiring payment, it did not violate the requirements of this rule. Specifically regarding R 460.126, DTE argues that because DTE did not bill Ms. Brooks for \$7,000, it cannot have violated this rule. DTE also argues: “Ms. Brooks’ alleged ‘financial circumstances’ as articulated in Commission Rule R 460.126 is belied by the fact that Ms. Brooks apparently has sufficient funds to pay her legal counsel for this unnecessarily protracted litigation.”<sup>203</sup>

Relying solely on its record indicating that service was disconnected in August 2009, DTE disputes Complainant’s characterization of this dispute as arising from DTE’s failure to bill Ms. Brooks:

While the Company continued to take meter readings, as it does with every meter it owns, there was no active service agreement for the first floor of the Monica Property. As such, DTE Electric’s policy with respect to under, over, or non-billing has no applicability here. Ms. Brooks’ case is a matter of unauthorized use, not non-payment.<sup>204</sup>

DTE also argues that Consumers Energy’s approach to allegations of unauthorized use are irrelevant.<sup>205</sup> DTE argues that Ms. Brooks falsely argues that DTE employees instruct customers accused of unauthorized use that they are prohibited from seeking assistance from agencies that help low-income customers.<sup>206</sup>

DTE argues:

Ms. Reid testified that it was her understanding that agencies such as the Michigan Department of Public Health and Family Services do not pay

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<sup>203</sup> See DTE reply brief, page 10.

<sup>204</sup> See DTE reply brief, page 10.

<sup>205</sup> See DTE reply brief, page 11

<sup>206</sup> See DTE reply brief, page 11.

charges associated with unauthorized use. 4 T 318. At no time did Ms. Reid state, and the Company has no policy, “prohibiting” customers from seeking assistance from agencies that help low-income customers. This assertion is nothing more than a disingenuous twisting of testimony by Complainant.<sup>207</sup>

DTE also argues that its destruction of the meter is not relevant.<sup>208</sup> It argues that the Complainant has offered no basis for imposing a fine on DTE, or for the amount of a fine she requests be imposed on DTE.<sup>209</sup> DTE further argues that Ms. Brooks failed to mitigate any harm she suffered from being without power for over a year, because she could have moved into the upstairs apartment unit.<sup>210</sup>

#### IV.

#### **DISCUSSION**

Before turning to the specific statutory and regulatory violations alleged in the complaint, the key disputed and undisputed facts are addressed in section A. Section B then examines the legal disputes between the parties over the definitions of unauthorized use and customer, while section C looks at each count of the complaint to address the specific arguments of the parties based on the factual findings.

##### A. Findings of Fact

The ALJ makes the following findings of fact based on the preponderance of the evidence in the evidentiary record. While DTE argues that the Complainant has the burden of proof to establish all facts by a preponderance of the evidence, DTE’s argument does not specifically recognize that DTE has the burden to establish facts

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<sup>207</sup> See DTE reply brief, page 11.

<sup>208</sup> See DTE reply brief, page 12-14

<sup>209</sup> See DTE reply brief, pages 14-16.

<sup>210</sup> See DTE reply brief, pages 15-16.

constituting its affirmative defenses, including its claims that Ms. Brooks engaged in unauthorized use or otherwise acted wrongly.

1. DTE did not disconnect Ms. Brooks' electric service on August 31, 2009.

A key factual dispute between the parties is whether DTE in fact disconnected Ms. Brooks' electric service on August 31, 2009. Ms. Brooks testified that this did not happen, while DTE argues that its records reflect that electric service was disconnected on August 31, 2009. The ALJ finds Ms. Brooks' testimony on this point entirely credible. First, Ms. Brooks testified in person and her demeanor was honest and sincere. This alone is sufficient to accept her testimony.

DTE relies on its records, but its records are clearly suspect. For instance, DTE also claims that Ms. Brooks' gas service was disconnected on the same date, citing the same records, but acknowledges that it continued to bill her for gas service because no "final meter reading" was recorded on August 31, 2009. Indeed, DTE seems to acknowledge that Ms. Brooks' gas service was in fact not interrupted.<sup>211</sup> DTE has offered no explanation why it continues to believe the record from the same date regarding the electric meter.

Moreover, DTE claims it did not consider Ms. Brooks an electric customer after August 31, 2009, yet DTE billed Ms. Brooks in September for electric usage through its September 14, 2009 meter reading, as shown by the bill in Exhibit C-12.<sup>212</sup> If DTE believed that service was discontinued on August 31, 2009, why did it use the later reading in preparing the bill? What DTE now labels a "final reading" appears to have

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<sup>211</sup> See Robinson, 4 Tr 262.

<sup>212</sup> The meter reading recorded on August 31, 2009 was 85723 as shown in Exhibit R-5, page 4; DTE's September 14, 2009 bill used the September 14, 2009 meter reading of 85924 as shown in Exhibit R-1, line 151.

been ignored by DTE's system. Given that DTE used the September 14, 2009 meter reading in billing for both electric and gas service, and given that DTE claims its records showed both services had been disconnected, DTE has provided no rational explanation, other than an error, to explain the different billing treatment for gas and electric service.

A review of the August 31, 2009 records DTE relies on, contained in Exhibit R-5, also raises a question as to the reliability of these records as an indication that electric and gas service were actually disconnected on that date. Nowhere in Exhibit R-5 do the technicians report that electric or gas service was actually disconnected or the meters turned off. The exhibit has 8 pages after the cover page. The first four pages relate to "residential electric service", while the last four pages relate to "residential gas heating." DTE relies on the statement on pages 4 and 8 of Exhibit R-5 in the box "coll ref code" of "R-service locked".<sup>213</sup> The event type for the electric service is labeled "inaccessible meter cut", while the event type for the gas service is labeled "inaccessible gas meter."<sup>214</sup> Inability to access the meters at the property to turn service on or off has been reported several times in DTE records. Also, the time records in Exhibit R-5 show technicians at the site for only a matter of seconds: the "FSA at job" is shown as 10:55:16, complete by 10:55:41, an elapsed time of 25 seconds for the electric meter; the "FSA at job" is shown as 10:55:54, complete by 10:56:00, an elapsed time of 6 seconds for the gas meter.<sup>215</sup>

Pages 2 and 6 of Exhibit R-5 indicate that field data has been successfully sent and that "the event action is complete", but a review of other similar DTE records in

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<sup>213</sup> See DTE brief, page 3.

<sup>214</sup> See Exhibit R-5, pages 1 and 5.

<sup>215</sup> See pages 3 and 7 of Exhibit R-5.

Exhibit R-3 shows that technicians report the “event action is complete” even when they have been unable to gain access to the property. Exhibit R-3 contains 24 pages, not including a cover page. The first pages relate to December 4, 2007 visit to disconnect service. The comparable record to the records in Exhibit R-5 indicates: “Field data is successfully send [sic] to CTV. The even action is complete.”<sup>216</sup> This record, after stating the event completion code of 05 states “inaccessible meter.”<sup>217</sup> DTE does not claim that Ms. Brooks’ service was disconnected on December 4, 2007, but instead on December 6, 2007.<sup>218</sup>

Likewise, Exhibit R-3 includes the records of a visit to the property on August 10, 2007, with the label “Restore Electric Service-at Meter”.<sup>219</sup> Even though the record states: “Can not get in received from FSA reason: INACCESSIBLE Remarks from FSA for CGI: No answer at house, unchained pitbull [sic] in yard,” it also states: “The event action is complete.”<sup>220</sup> The next page of this record also states: “job locked”, which is similar to the statement in the August 31, 2009 record stating “service locked”.<sup>221</sup> It does not state that the meter was turned off.

The records DTE relies on to support its claim that service was disconnected on August 31, 2009 do not contain the detail of records DTE has produced from other service calls where the technicians clearly had access to the meter because they report the condition of the meter when the technicians arrived and the condition of the meter when the technicians left. DTE presented records of service calls made on

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<sup>216</sup> See Exhibit R-3, page 2.

<sup>217</sup> See Exhibit R-3, page 3.

<sup>218</sup> See Robinson, 4 Tr 228.

<sup>219</sup> See Exhibit R-3, page 10.

<sup>220</sup> See Exhibit R-3, page 11.

<sup>221</sup> See Exhibit R-3, page 12; see Exhibit R-5, pages 4 and 8.

January 6, 2015, to disconnect service, and on February 24, 2016 to reconnect service at the property. These records are contained in Exhibits R-8 and R-11. Exhibit R-8 contains 7 pages not including the cover page relating to the January 6, 2015 date on which Ms. Brooks' service was disconnected. The event type on page 1 is labeled "pole cut theft." The fifth page of Exhibit R-8 reports "OK on arrival" under the heading "condition found", and reports "request completed" under the heading "condition left." As shown in Exhibit R-8, page 7 in the "remarks" box, the record clearly states: "Theft Cut Service Cut at Pole by Energy Group J. Vaugh on 01.06.15." Exhibit R-11 relates to DTE's restoration of service on February 22 and February 24, 2017. This exhibit contains 11 pages not including a cover page. Pages 5 and 11 report "condition found" and "condition left". Page 11 also reports "request completed."

DTE collected the same type of record in 2007. As shown in Exhibit R-3, when DTE actually inspected the meter on December 18, 2007, DTE's records have an entry for "condition found" and "condition left". Page 17 of Exhibit R-3, not including the cover page, states "MTR ON ON ARRIVAL" under "condition found," and "OK ON ARRIVAL" under "condition left." Again, there is an explicit statement: "Request Complete."

Because the records in Exhibit R-5 proffered by DTE for August 31, 2009 do not explicitly state that the meter was turned off, do not report the condition found and condition left, do not contain a meter reading for the gas service, and indicate the technicians were at the site only for a matter of seconds, the ALJ concludes that the records do not support DTE's contention that service was disconnected on August 31, 2009.

2. Ms. Brooks did not know she was not being billed for electric service after September 14, 2009.

DTE stopped billing Ms. Brooks for electric service provided to her after September 14, 2009, as noted above. Ms. Brooks testified clearly that she was not aware she was not being billed for electric service, both in her direct testimony and in her rebuttal testimony. The ALJ finds Ms. Brooks' testimony credible on this point.

DTE argues that it "strains credulity" that Ms. Brooks received 60 bills and did not notice that there were no separately-stated electric service charges,<sup>222</sup> but this PFD does not find this to be the case. First, DTE sent Ms. Brooks several other bills--during the period when it acknowledges it was providing service to her--that did not separately identify charges for electric service, but simply reported "other charges." On close scrutiny, these appear to be bills for months in which Ms. Brooks' electric bill was based on an estimated meter reading.<sup>223</sup> Ms. Robinson acknowledged this in cross-examination.<sup>224</sup> Ms. Brooks also testified to a combination of factors in her life, a son seriously injured in a car accident and medical difficulties of her own, that make it plausible she was not scrutinizing her utility bills. Even though DTE claims it did not "discover" Ms. Brooks' use until Mr. Trousdale's visit,<sup>225</sup> DTE acknowledges that it recorded 60 meter readings during that time period, each showing increased consumption over the prior readings.<sup>226</sup>

DTE also points to Ms. Brooks' lower average monthly bills in support of its argument that Ms. Brooks must have been aware she was not being billed for electric

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<sup>222</sup> See DTE reply brief, page 5.

<sup>223</sup> See Exhibit R-4, June 19, 2009 bill, page 10 (not including the cover page); see Exhibit R-4, July 22, 2009 bill, page 12 (not including cover page).

<sup>224</sup> See 4 Tr 267.

<sup>225</sup> See DTE brief, pages 3,6.

<sup>226</sup> See, e.g., Robinson, 4 Tr 230.

service, citing Exhibit R-1.<sup>227</sup> Yet Ms. Brooks' total outstanding account balance still varied significantly, as shown in Exhibit R-1, and she received assistance paying her bills on more than one occasion, as shown in Exhibit R-1, lines 152, 174 and 175, and incurred many late-payment fees.

3. Ms. Brooks did not steal electric service from DTE, or commit any act involving dishonesty.

At some points DTE appears to concede that Ms. Brooks did not engage in theft of utility service or commit another act involving dishonesty. Ms. Robinson acknowledged in her cross-examination that DTE never conducted an investigation in which theft, fraud or meter tampering were found.<sup>228</sup> In its initial brief, DTE states: "In this proceeding, DTE Electric does not posit that Ms. Brooks engaged in any criminal or unlawful act."<sup>229</sup> Yet, DTE does accuse Ms. Brooks of criminal conduct and conduct involving dishonesty.

In its initial brief, DTE claims that Ms. Brooks' conduct was akin to conversion of property, which is both a tort and a crime,<sup>230</sup> although DTE cites only the civil statute:

Complainant's overly myopic interpretation is also inconsistent with Michigan jurisprudence, which recognizes civil actions for acts that are not prosecuted as criminal or unlawful, but nevertheless give rise to a civil claim. For example, the Michigan Supreme Court recently affirmed that under the common law, conversion is a "distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein." See *Aroma Wines & Equip, Inc v Columbian Distrib Servs, Inc*, 497 Mich 337, 346; 871 NW2d 136 (2015). Conversion is not a criminal action, but a civil action where treble damages are awarded. See, e.g., MCL 600.2919a(1).

In this proceeding, **DTE Electric does not posit that Complainant engaged in any criminal or unlawful act.** Instead, the evidentiary record

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<sup>227</sup> See DTE brief, pages 5-6.

<sup>228</sup> See 4 Tr 271-273.

<sup>229</sup> See DTE brief, page 11.

<sup>230</sup> See, e.g., MCL 750.362.

shows that Complainant **wrongfully used** the Company's electric service during the period of September 2009 through December 2014 without paying for it. Electric service is not a good in the commercial sense, but if it were, then DTE Electric would have a conversion claim against Complainant and be entitled to treble damages pursuant to MCL 600.2919a(1). Nevertheless, DTE Electric maintains that Complainant's wrongful use of electric service without paying for it after she was disconnected for non-payment in August 2009 constitutes "unauthorized use of utility service." Wrongful use of electric service does not have to rise to the level of outright "theft." In Ms. Brooks' case, there was ample opportunity to review any of the 60 plus bills she received for gas service and notice that she was not being charged for electric service. Continuing to accept electric service without even attempting to pay for it is unauthorized use. Such an interpretation is appropriate given the billing rule's use of the language "including but not limited to..." See Commission Rule R 460.102(ss).<sup>231</sup>

DTE accuses Ms. Brooks of "wrongful use of electric service without paying for it after she was disconnected for non-payment," to show that Ms. Brooks acted inconsistently with DTE's rights.<sup>232</sup> Consistent with the foregoing discussion, because the ALJ finds that DTE did not shut off electricity to Ms. Brooks' apartment in 2009, and did not know she was not paying for electric service, the ALJ finds that Ms. Brooks did not commit an act that was inconsistent with DTE's property interest.

In its reply brief, in a footnote, DTE moves from a civil conversion claim to a claim that Ms. Brooks engaged in conduct akin to "larceny by constructive trespass."<sup>233</sup> DTE argues:

In Ms. Brooks' case, unauthorized use of electric service is the service equivalent to a type of larceny that is only applicable to property (larceny by a constructive trespass), which "...occurs when a property owner mistakenly gives another person more property than is due, and the recipient knows about the error but does not disclose it before taking the

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<sup>231</sup> See DTE brief, pages 11-12.

<sup>232</sup> See DTE brief, page 12. DTE seems to be unaware that it is also a crime to steal or to fraudulently use electric service. See, e.g., MCL 750.282.

<sup>233</sup> See DTE brief, page 6 at n12.

excess property with the intent of converting it to his or her own use.” See *Black’s Law Dictionary* 959 (9<sup>th</sup> ed 2009).<sup>234</sup>

While DTE states that it is not asserting that Ms. Brooks herself engaged in any illegal activity with respect to the meter,<sup>235</sup> DTE argues “this is not the first instance at the Monica Property where the meter was on and registering use after DTE Electric disconnected service.”<sup>236</sup> In making this claim, DTE cites its records from December 2007, when DTE claims it also disconnected Ms. Brooks’ service. DTE believes it disconnected Ms. Brooks’ electric service on December 6, 2007, but discovered that the service was already on (with a locked meter and a good seal) when it gained access to her meter to restore service on December 18, 2007. DTE then cites Mr. Trousdale’s testimony that when he visited the property on December 5, 2014, there was no seal on the meter, although it was locked.<sup>237</sup> DTE suggests without explicitly formulating a theory that Ms. Brooks’ meter was tampered with in 2007 and thus suggests the Commission should believe it was tampered with in 2009.<sup>238</sup>

The ALJ does not find DTE’s suggestion persuasive. As noted above, the ALJ accepts Ms. Brooks’ testimony that her electric service was not disconnected in 2009. Ms. Brooks also testified quite clearly that she did not steal electricity, and the ALJ finds Ms. Brooks’ testimony to be credible. The ALJ finds that neither the 2007 records nor Mr. Trousdale’s testimony regarding a missing seal diminish Ms. Brooks’ credibility.

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<sup>234</sup> See DTE reply brief, page 6 at n12.

<sup>235</sup> See DTE reply brief, page 5.

<sup>236</sup> See DTE reply brief, page 5.

<sup>237</sup> See DTE reply brief, pages 5-6, citing Trousdale, 4 Tr 207-215.

<sup>238</sup> Meter tampering is also a crime. See, e.g., MCL 750.383a.

DTE records from 2007 show that Ms. Brooks made a payment on December 7, 2007, that DTE initially assessed and then reversed a deposit of \$304 on that date,<sup>239</sup> that DTE dispatched technicians to restore service on December 10, 2007, who reported that they were unable to gain access to the meter,<sup>240</sup> that Ms. Brooks meter was registering use when the meter was read on December 10, 2007,<sup>241</sup> and that DTE assessed a deposit of \$304 on December 17, 2007, and a reconnection fee of \$20 on December 18, 2007.<sup>242</sup> DTE records in Exhibit R-3 also seem to report that Ms. Brooks made two phone calls asking for her service to be restored, one on December 7 and one on December 17, 2007. Ms. Brooks testified that she does not remember her service being shut off in 2007.<sup>243</sup>

The 2007 incident, almost ten years ago, did not cause DTE to undertake any investigation at the time. Additionally, there are several possibilities to explain why Ms. Brooks' power was on when the technicians arrived on December 18, 2007. The most likely explanation is that the power was not turned off on December 6, 2007, since DTE's December 6, 2007 records are no more convincing than DTE's August 31, 2009 records, for the same reasons.<sup>244</sup> As noted above, meter readings shown in Exhibit R-3, page 9, indicate the meter was on, registering use, on December 10, 2007, well before Ms. Brooks' call of December 17, 2007. If the power was never turned off, Ms. Brooks' phone calls would likely have been prompted by DTE requests for access to the meter.

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<sup>239</sup> See Exhibit R-1, lines 40, 41, and 42.

<sup>240</sup> See Exhibit R-3.

<sup>241</sup> See Exhibit R-1, line 44, and Exhibit R-3, page 9 (not including the cover page).

<sup>242</sup> See Exhibit R-1, lines 45 and 46.

<sup>243</sup> See 4 Tr 131-132.

<sup>244</sup> See Exhibit R-3, pages 5-8, not including the cover page.

Regarding Mr. Trousdale's testimony, this PFD finds that the missing seal is not significant. Mr. Trousdale did not put it in his report, as shown by Exhibit R-12. He testified that he did not rely on the missing seal in concluding there had been unauthorized use.<sup>245</sup> Ms. Brooks' meter, which had been continuing to register usage at each reading following August 31, 2009, was read approximately 60 times since August 31, 2009, with no anomalies reported. In addition, other conclusions Mr. Trousdale reached regarding the meters at the property appear to have been erroneous, as discussed below, making his testimony unreliable.

4. DTE did not expressly communicate to Ms. Brooks that it no longer considered her an electric customer after August 31, 2009, at least until December 5, 2014.

As noted above, DTE stopped billing Ms. Brooks for electric service after September 14, 2009. While DTE stopped billing Ms. Brooks for electric service, DTE did not cite any communication expressly advising Ms. Brooks that she was no longer an electric customer.

Ms. Robinson testified that DTE sent Ms. Brooks a shutoff notice with her August 14, 2009 bill, which is included in Exhibit R-4. She testified that DTE records do not reflect any further communications with Ms. Brooks regarding the alleged disconnection of her service on August 31, 2009.<sup>246</sup> DTE also did not return Ms. Brooks' deposit, the \$304 it assessed on December 17, 2007. A review of the billing records in Exhibit R-1 show that the deposit was returned approximately five years after it was collected, on December 7, 2012.<sup>247</sup>

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<sup>245</sup> See 4 Tr 215-216.

<sup>246</sup> See 4 Tr 265.

<sup>247</sup> See Exhibit R-1, lines 45 and 254.

5. Mr. Trousdale incorrectly diagnosed backfeed at the property when he visited on December 5, 2014.

As discussed above, the record reflects some dispute over the nature of wiring issues at the property. Mr. Trousdale testified that he measured a heavy load on second floor meter, which he diagnosed as electrical backfeed. He testified that he determined that the electrical backfeed was coming from the first floor meter. He testified that he looked at the breaker panels in the basement and concluded that some wires were crossed, so as to feed electricity from the second floor meter to the first floor if the first floor's power was shut off, and vice versa.<sup>248</sup> Mr. Trousdale also testified that he observed a wire running from the second floor panel to the third floor, which to him explained the heavy load he observed on the second floor meter.<sup>249</sup> Mr. Trousdale testified that he shut off and tagged the breakers that were causing the backfeed.<sup>250</sup> He also testified that he reported this to the management company managing the property, and to Ms. Brooks and the gentleman at the house with her. Ms. Brooks reported that after Mr. Trousdale's visit, her furnace no longer worked.

Mr. Taylor, a master electrician and contract electrician with almost 40 years' experience who was hired by the management company, performed a closer inspection of the wiring after Mr. Trousdale turned off and tagged circuit breakers on each panel.<sup>251</sup> Mr. Taylor testified that the first floor meter was not taking electricity from the second floor meter, but instead, wires that belonged in the second floor meter had been improperly connected to the first floor meter.<sup>252</sup> He testified:

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<sup>248</sup> See 4 Tr 208.

<sup>249</sup> See 4 Tr 208.

<sup>250</sup> See 4 Tr 209.

<sup>251</sup> See 4 Tr 189, 190.

<sup>252</sup> See 4 Tr 192.

After I disconnected the second floor wires that had been improperly attached to the first floor meter, all of the electricity was restored to the lower unit. When I left the Monica Property the lower unit had full electrical service.<sup>253</sup>

Mr. Taylor also testified that there was no evidence of backfeed. He explained that although he could not access the electrical meters, the improper wiring he observed would not have caused backfeed. He also explained that backfeed is usually caused by accident when someone crosses a wire. He explained that if there was backfeed, Ms. Brooks would not have lost power when DTE cut the electric service at the pole.<sup>254</sup> Mr. Taylor testified that a “residual on the neutral” could have caused Mr. Trousdale to think there was backfeed when there was not backfeed.<sup>255</sup> He testified that nothing can be done to correct this condition and it is not dangerous. He also testified that after his visit, DTE removed and replaced both meters, explaining that DTE would not have done that if there was backfeed.

DTE did not challenge Mr. Taylor’s rebuttal testimony in any way. Based on his years of experience and the lack of any criticism of his analysis on this record, this PFD finds Mr. Taylor’s testimony persuasive. Since Ms. Brooks did lose electrical service when DTE cut the electric service at the pole on January 6, 2015, the ALJ concludes there was no backfeed. Additionally, since Mr. Trousdale confused the wiring connected to the two meters, he may also have been mistaken regarding which meter was sealed.

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<sup>253</sup> See 4 Tr 192.

<sup>254</sup> See 4 Tr 193-194.

<sup>255</sup> See 4 Tr 195.

6. DTE did not provide a shutoff notice to Ms. Brooks prior to the January 6, 2015 disconnection of her electric service.

There is no dispute that DTE did not provide a shutoff notice to Ms. Brooks prior to the January 6, 2015 disconnection of service to her unit.<sup>256</sup> Although DTE stated in its initial brief that: “In cases of unauthorized use, the Company does not provide a shutoff notice.”<sup>257</sup> DTE cites Ms. Robinson’s testimony at 4 Tr 235. In her testimony at that page, Ms. Robinson testified first that no shutoff notice is mailed in cases of unauthorized use. Then, after asserting that there was no customer of record for the first floor, she testified: “That is why *no shutoff notice was provided during that time period* because there was no customer on the account to notify.” In its reply brief, DTE also states “no notice of shutoff was necessary or provided.”<sup>258</sup> Nonetheless, elsewhere in its reply brief, DTE faults Complainant’s brief for asserting that DTE admits it did not leave a notice at Brooks’ home on January 6, 2015: “This is not true. In fact, there is no testimony in the record by any DTE Electric witness that discusses whether or not a notice was left at the first floor of the Monica Property when service was cut at the pole on January 6, 2015.”<sup>259</sup>

While the parties primarily have a legal dispute whether any notice was required, this PFD concludes that Ms. Robinson’s testimony at 4 Tr 235 and the statement in DTE’s initial brief at page 17 support Complainant’s contention that no notice whatsoever, including a notice left at the property, was provided to Ms. Brooks on January 6, 2015.

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<sup>256</sup> See Brooks, 4 Tr 117.

<sup>257</sup> See DTE brief, page 17.

<sup>258</sup> See DTE reply brief, page 9.

<sup>259</sup> See DTE reply brief, page 7.

7. At the time DTE disconnected service to Ms. Brooks on January 6, 2015, DTE knew that Ms. Brooks was disputing its claim that she engaged in unauthorized use of electric service, and knew she claimed to be a low-income customer eligible for shut-off protection.

As discussed above, after Mr. Trousdale's visit on December 6, 2014, Ms. Brooks called and visited DTE before DTE disconnected her service on January 6, 2015. Ms. Brooks testified that she called DTE on December 6, 2014, and went to DTE's offices on December 8 and December 12, 2014.<sup>260</sup> She testified that she told Ms. Reid on December 8, 2014 that she wanted documentation of what DTE claimed she owed, and that she told Ms. Reid she was a low-income customer.<sup>261</sup> She testified that she made clear to DTE that the amount the company was seeking from her was in dispute.<sup>262</sup> She testified that she made clear to DTE that she was disputing DTE's allegations of theft and unauthorized use of utility services.<sup>263</sup>

DTE's records reflect that Ms. Brooks inquired about a shut-off protection plan on December 8, 2014, and also the possibility of obtaining assistance from a state agency. Exhibit C-1 contains the record of Ms. Brooks' December 8 visit to DTE as reported by Ms. Reid:

Explained to Carol Brooks . . . a SPP [shut-off protection plan] can not be used for UU [unauthorized use] charges. . . Cust[omer] has been adv[ised] [the] est[imated] [amount] needed is \$7K and agencies do not pay theft charges. I also declined her reques[t] to put the [service] in a family [member] name so Carol can avoid paying her theft [amount].<sup>264</sup>

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<sup>260</sup> See 4 Tr 116.

<sup>261</sup> See 4 Tr 138.

<sup>262</sup> See 4 Tr 139-140.

<sup>263</sup> See 4 Tr 140.

<sup>264</sup> See 4 Tr 318, 324.

Exhibit C-2 contains notes from Ms. Brooks' December 12 visit to DTE, as reported by Ms. Adkins:

Carol Brooks in [office] with pid [personal identification], advised to come back when she is prepared to pay [\$]7000.00 and be billed for [electric unauthorized use] at the address . . .<sup>265</sup>

While Ms. Robinson testified that "as of December 6, 2014," Ms. Brooks had not advised DTE she was a low-income customer, and further testified that DTE does not have a record indicating that Ms. Brooks provided the required information, a review of Ms. Brooks' communications with Ms. Reid, including DTE's record as quoted above, shows that DTE was not willing to consider her eligibility.

The ALJ finds that before it disconnected service to Ms. Brooks on January 6, 2015, DTE was aware that Ms. Brooks was disputing its claim that she engaged in unauthorized use, and that Ms. Brooks was a low-income customer seeking shutoff protection.

#### B. Legal Analysis

This section discusses the application of the statutes and rules identified in the first thirteen counts of the Second Amended Complaint to the factual findings above. First, it is important to acknowledge the Complainant's reliance on *Memphis Light, Gas & Water Div v Craft*, 436 US 1; 98 S Ct 1554; 56 L Ed 2d 30 (1978). In this case, the United States Supreme Court recognized the importance of utility service, holding that due process rights attach to the denial of utility service:

Under the balancing approach outlined in [*Matthews v Eldridge*, 424 US 319 (1976)], some administrative procedure for entertaining customer complaints prior to termination is required to afford reasonable assurance against erroneous or arbitrary withholding of essential services. The customer's interest is self-evident. Utility service is a necessity of modern

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<sup>265</sup> See 4 Tr 344.

life; indeed, the discontinuance of water or heating for even short periods of time may threaten health and safety. And the risk of an erroneous deprivation, given the necessary reliance on computers, is not insubstantial.<sup>266</sup>

This holding provides important context for state law and Commission regulations governing the relationship between a utility and its customers.

In addition, it is important to address two key legal disputes between the parties that are common to their disputes regarding Commission rules. Those key legal disputes are whether Ms. Brooks remained a “customer” of DTE to whom the protections of the rules apply, and whether she engaged in unauthorized use in the absence of any wrongdoing on her part. Unauthorized use is discussed in section 1, while the customer relationship is discussed in section 2. Section 3 reviews DTE’s options for handling Ms. Brooks’ dispute consistent with the Commission’s billing rules. Section 4 looks at the individual counts of Ms. Brooks’ Second Amended Complaint.

#### 1. Unauthorized Usage

The Commission’s residential billing rules define unauthorized use as follows:

"Unauthorized use of utility service" means theft, fraud, interference, or diversion of service, including but not limited to meter tampering (any act which affects the proper registration of service through a meter), by-passing (unmetered service that flows through a device connected between a service line and customer-owned facilities), and service restoration by anyone other than the utility or its representative.<sup>267</sup>

MCL 460.9d(9)(f) also defines unauthorized use, in similar language:

“Unauthorized use of electric or natural gas service” or “unauthorized use” means theft, fraud, interference, or diversion of electric or natural gas service, including, but not limited to, meter tampering, bypassing, and service restoration by anyone other than the utility or its representative.

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<sup>266</sup> *Id.*, 436 US at 18 (footnotes omitted).

<sup>267</sup> See R 460.102(ss).

As discussed in the fact-finding section of this PFD, Ms. Brooks did not engage in theft, fraud, interference, or diversion of her electric service. Putting aside DTE's claims that Ms. Brooks intended to take service without paying for it, which were rejected in section A above, DTE also argues that Ms. Brooks engaged in unauthorized use because she received electric service without paying for it, because she "knew or should have known that she was not being billed for electric service," or because she used electric service without being a "customer of record."<sup>268</sup> DTE argues that the "including but not limited to" language in R 460.102(ss) and R 460.9d(9)(f) is broad:

Ms. Brooks argues that she did not engage in unauthorized use "as defined by MCL 460.9d (i.e. "theft, fraud, interference, or diversion of electric service.\*)" Comp. Brf. at 19. This narrow focus on the types of unauthorized use specifically listed in the statute conveniently ignores the subsequent phrase "**including, but not limited to**, meter tampering, bypassing, and service restoration by anyone other than the utility or its representative." MCL 460.9d (emphasis added). The Commission rules further define unauthorized use as "...theft, fraud, interference, or diversion of service, **including but not limited to** meter tampering (any act which affects the proper registration of service through a meter), by-passing (unmetered service that flows through a device connected between a service line and customer-owned) and service restoration by anyone other than the utility or its representative." Commission Rule 460.102(ss). (Emphasis added.)<sup>269</sup>

DTE then argues that the Complainant's interpretation violates established principles of statutory construction:

The Michigan Supreme Court has affirmed longstanding rules of law regarding principles of statutory interpretation. Specifically, the overall context of a statute (or rule) must be reviewed "so as to produce, if possible, a harmonious and consistent enactment as a whole." The court "must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory."<sup>7</sup> If Complainant's definition of unauthorized use is accepted, then the phrase "including but not limited to" is read out of the statute and

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<sup>268</sup> See DTE reply brief, page 6.

<sup>269</sup> See DTE reply brief, page 2.

the applicable Commission Rule if the myopic interpretation advocated for by Ms. Brooks is applied.<sup>270</sup>

In its initial brief, DTE argues that criminal or unlawful acts are not required for “unauthorized use”:

Complainant advocates for an interpretation that is limited to criminal or unlawful acts. However, a plain reading of the [R 460.102(ss)] clearly does not limit “unauthorized use of utility service” to criminal or unlawful acts due to its use of the language “including but not limited to....” Thus, unauthorized use of utility service can include **any instance where a customer takes service without paying for it.**<sup>271</sup>

DTE’s arguments that Complainant engaged in “unauthorized use” as defined in R 460.102(ss) or MCL 460.9d must be rejected. First, Complainant is correct that unauthorized use is limited to “theft, fraud, interference, or diversion of service.” The “including but not limited to” language DTE cites provides non-exclusive examples of theft, fraud, interference or diversion; the language does not add to the list of conduct that constitutes unauthorized use. As used in the statute, meter tampering, bypassing a meter, and service restoration are examples of theft, fraud, interference, and/or diversion, not additional independent elements of the definition of unauthorized use.

As discussed above, the ALJ found by a preponderance of the evidence that Ms. Brooks did not engage in theft or fraud, and did not interfere with or divert her utility service, and indeed did not engage in any conduct involving dishonesty. Merely failing to discover that you are not being billed for electric service does not constitute theft, fraud, interference or diversion. This PFD concludes that because Ms. Brooks lacked any intent to obtain service without paying for it, and lacked actual knowledge that she

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<sup>270</sup> See DTE reply brief, pages 2-3 (footnotes omitted).

<sup>271</sup> See DTE brief, page 11 (footnote omitted). (Also see DTE brief, page 10: “The central issue for this case is whether Ms. Brooks’ usage of electricity for over five years without paying for it is unauthorized use of utility service.”)

was not paying for the service she was using, Ms. Brooks did not engage in unauthorized usage. While DTE characterizes her use of electric service without paying for it as “wrongful,” under the applicable terms and conditions of service as set forth in the Commission’s residential billing rules, DTE is legally obligated to bill its customers for service rendered, while Ms. Brooks committed no identifiable wrongful act.

It must also be remembered that the term at issue is “unauthorized use”. “Unauthorized” means without permission or authority. Based on the record evidence, this PFD concludes that Ms. Brooks’ use of electricity was authorized, not unauthorized. DTE clearly agreed to provide service to Ms. Brooks under the terms of its tariffs, Commission rules, and other applicable statutory provisions. DTE had been providing service to that location for decades. DTE collected a deposit from Ms. Brooks in 2007, as shown in Exhibit R-1, line 45. While DTE, in reliance on its records, believes it disconnected service to Ms. Brooks in 2009, DTE did not in fact disconnect service in 2009, as discussed in section A above. DTE took no other affirmative steps to indicate to Ms. Brooks that she was no longer “authorized” to receive service. DTE did not provide any additional notice, or make any additional phone calls to terminate service. DTE billed her in the ordinary course for service “through September 14, 2009”, making no reference in its September bill or in future bills to its belief that service had been terminated. DTE continued to read her meter. DTE did not refund Ms. Brooks deposit until December 2012, approximately 5 years after it collected the deposit, as shown in Exhibit R-1, line 254. Nonetheless, through an inexplicable billing error, not unauthorized use, DTE stopped billing Ms. Brooks for electric service after

September 14, 2009. The Commission rules specify the rights and obligations of the parties in the event of a billing error, as discussed below.

## 2. “Customer” Status

DTE argues that Ms. Brooks ceased to be a “customer” or a “customer of record” when it disconnected her service on August 31, 2009. While the record establishes that DTE did not in fact disconnect Ms. Brooks’ service on August 31, 2009, because DTE’s legal arguments rely significantly on this claim, it is appropriate to address it initially. R 460.102(k) defines customer as “a purchaser of electric or natural gas that is supplied or distributed by a utility.” DTE argues that “purchaser” means one who pays, and because Ms. Brooks did not pay for electric service from September 14, 2009 [DTE says August 31, 2009], she ceased to be a customer. This PFD concludes that Ms. Brooks did not lose her status as a customer because DTE stopped billing her for electric service. Instead, Ms. Brooks remained obligated to pay for the electrical service she received in accordance with the applicable tariffs and Commission rules, and should thus be considered a “purchaser” of the service DTE was providing until January 6, 2015. As noted above, DTE took no affirmative steps to inform Ms. Brooks that she was not authorized to use service; likewise, it took no affirmative steps to advise her that she was no longer a customer.

In December 2014, when Ms. Brooks approached DTE about her service following Mr. Trousdale’s statement that her service was unauthorized, Ms. Brooks was not a “previous customer” as defined in R 460.102(ii) because she was currently receiving service, and she was not a new customer as defined in R 460.102(ee) because she had received service within the last six years.

DTE clearly had Ms. Brooks' account information, including the associated address.<sup>272</sup> Even if DTE had lost her electric account information when it "discovered" that it had not been billing her, she advised DTE immediately after Mr. Trousdale's visit that she was their customer at the property, and wanted to resolve the claim that she had not paid for service. Ms. Reid testified regarding her note of December 8, 2014, in Exhibit C-1:

The document reflects my meeting with Carol Brooks. Particularly that she was responsible for unauthorized usage charges at the address she was looking to have restored.<sup>273</sup>

Note that DTE has not managed to discuss Ms. Brooks without referring to her as a customer. In its initial brief, DTE argues: "The interaction between Ms. Reid and Ms. Brooks was no different than any interaction Ms. Reid typically has with any other customer who may have unauthorized usages charges on their account."<sup>274</sup>

Importantly, if DTE could unilaterally declare its customers to no longer be customers, any person receiving service who disputes a DTE bill could be designated a non-customer by not paying the bill, losing the customer protections provided by the tariffs and Commission rules. Such an argument would lead to absurd results. As explained below, DTE was not entitled to refuse to provide service to Ms. Brooks in December 2014, whether it viewed her as a new customer, a current customer or a previous customer.

### 3. Proper Procedures

Before going through the complaint count by count, it is appropriate to review what the Commission's billing rulings provide for under these circumstances. First, had

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<sup>272</sup> See Adkins, 4 Tr 346.

<sup>273</sup> See 4 Tr 311.

<sup>274</sup> See DTE brief, page 8.

DTE properly recognized that Ms. Brooks did not engage in unauthorized use of electric service, DTE should have billed her under R 460.126(2)(b), which permits the utility to bill Ms. Brooks for the most recent 12 months of consumption using its available meter readings, and offered a payment plan over a period of at least 12 months, taking into account her financial circumstances. R 460.126(2) provides:

If a utility undercharges a customer, the following provisions apply:

(a) In cases that involve unauthorized use of utility service the utility may backbill the customer for the amount of the undercharge using the commission-approved process for estimating the bill. The utility may charge fees for unauthorized use of utility service in accordance with commission-approved tariffs.

(b) In cases that do not involve unauthorized use of utility service, the utility may backbill the customer for the amount of the undercharge during the 12-month period immediately preceding discovery of the error, and the utility shall offer the customer reasonable payment arrangements for the amount of the backbill, which shall allow the customer to make installment payments over a period at least as long as the period of the undercharge. The utility shall take into account the customer's financial circumstances when setting payment amounts.

If DTE refused to believe that Ms. Brooks did not engage in unauthorized use, DTE was permitted to bill her for the entire amount it believed was owed, as quoted above in R 460.126(1). Nonetheless, DTE was not authorized to refuse to produce a bill until she agreed to pay the bill, to deprive her of an opportunity to contest DTE's charge of unauthorized use or to contest the amount of its estimate, or to disconnect or refuse to restore her service while her dispute was being resolved.

Clearly the rules contemplate that utilities will provide an opportunity for an informal hearing for customers who dispute findings of unauthorized use. R 460.106 only allows the utility to require an applicant for service to pay a delinquent account as a condition of providing or continuing service if: "The delinquent account is not in dispute,

owed to the utility, and accrued within the last 6 years.” In such cases, the utility “shall provide the applicant with information on the process to refute or contest the delinquent account.” R 460.110(d) allows a utility to require a deposit as a condition of providing or restoring service to a previous customer or continuing service to a current customer if: “The customer or applicant engaged in unauthorized use of utility service within the last 6 years, if the finding of unauthorized use of utility service was made after notice and an opportunity for a hearing under these rules and is not in dispute.” As is clear from the testimony of Ms. Brooks and Ms. Hawkins, as well as the testimony from DTE’s own witnesses regarding their communications with Ms. Brooks, DTE refused to provide Ms. Brooks with any process to refute or contest its claim that she owed the utility \$7,000 for unauthorized usage “on her account.”

Similarly, the rules clearly contemplate that a utility will provide a bill to a customer accused of unauthorized use. R 460.111(b)(4) specifies the amount of a deposit that can be assessed in the event of unauthorized use, as authorized under R 460.110(d) quoted above. R 460.111(4) provides: “The utility may also require payment of the delinquent account and approved charges as a condition of providing, restoring, or continuing service if the account is in the customer's, or applicant's name, is delinquent, owed to the utility, and accrued within the last 6 years.” Unless there is a “delinquent account”, which is defined as “an account with charges for utility service that remains unpaid at least 5 days after the due date,”<sup>275</sup> the utility cannot require payment as a condition of providing, restoring, or continuing service under the rules. Again, note that R 460.111(4) follows the limit on deposits provided in R 460.110(d) to circumstances where there is no dispute; by using the phrase “is owed,” R 460.111(4)

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<sup>275</sup> See R 460.102(m).

makes clear that the utility cannot require the payment of disputed charges as a condition of providing, restoring, or continuing service.

4. Complaint Counts I through XIII

This section specifically addresses the statutes and rules cited in counts I through XIII of the Second Amended Complaint.

a. MCL 460.9q (Count I)

MCL 460.9q imposes certain statutory limits on the ability of certain providers to shut off service to their customers. These requirements generally track with the requirements of Commission rules regarding shutoff. Fundamentally, however, while no party has briefed this issue, the requirements of MCL 460.9q apply expressly to municipal utilities, not regulated by the Michigan Public Service Commission and thus not subject to Commission's billing rules. Note that the statute applies to "providers," and a provider is "a municipally owned electric or natural gas utility."<sup>276</sup> Thus, this PFD finds this count of the complaint should be dismissed.

b. MCL 460.10t (Count II)

MCL 460.10t (1) provides:

An electric utility . . . shall not shut off service to an eligible customer during the heating season for nonpayment of a delinquent account if the customer is an eligible senior citizen customer or if the customer pays to the utility . . . a monthly amount equal to 7% of the estimated annual bill for the eligible customer and the eligible customer demonstrates, within 14 days of requesting shutoff protection, that he or she has applied for state or federal heating assistance. If an arrearage exists at the time an eligible customer applies for protection from shutoff of service during the heating season, the utility or supplier shall permit the customer to pay the arrearages in equal monthly installments between the date of application and the start of the subsequent heating season.

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<sup>276</sup> See MCL 460.9q(23)(d).

An “eligible low-income customer” is “a customer whose household income does not exceed 150% of the poverty level . . . or who receives and of the following: (i) Assistance from a state emergency relief program. (ii) Food stamps. (iii) Medicaid.” The statute also prescribes the notice that must be required to shut off service to customers who do not comply with the terms and conditions of the shutoff protection program. Ms. Brooks argues that she was an eligible low-income customer, who requested shutoff protection, and should not have had her service disconnected during the heating season. She also challenges the lack of notice.

DTE argues that this statute is inapplicable for several reasons. DTE argues that Ms. Brooks was not a customer on January 6, 2015. DTE argues that Ms. Brooks did not provide documentation that she was an eligible low-income customer. And DTE argues that it did not shut off her service for “nonpayment of a delinquent account,” but instead shut off her service for unauthorized use.

This PFD rejected DTE’s argument that Ms. Brooks was not a customer in section 2 above. Regarding Ms. Brooks’ status as an eligible low-income customer, Ms. Brooks testified that she told DTE in December of 2014 that she was an eligible low-income customer, and Ms. Reid’s notes and testimony show that Ms. Brooks requested shutoff protection.<sup>277</sup> Ms. Reid’s notes in Exhibit C-1 confirm this. DTE failed to record this status, and refused to make the shutoff protection program available to Ms. Brooks, based on its erroneous conclusion that Ms. Brooks had engaged in unauthorized usage. Although DTE labeled its termination of Ms. Brooks’ service as “unauthorized use,” DTE had previously made it clear to Ms. Brooks that her service would not be terminated if she paid \$7,000. Thus, DTE in essence did disconnect her service for what DTE

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<sup>277</sup> See Brooks, 4 Tr 138; see Exhibit C-1; see Reid, 4 Tr 324.

viewed as a delinquent account. As reflected in Exhibit C-1, DTE viewed these charges as Ms. Brooks' responsibility: "I also declined her request to put the svc [service] in a family mbr [member] name so Carol can avoid paying *her theft amount*." Ms. Adkins also testified as follows in cross-examination:

Q: Now, with the \$7,000 amount, when – was there a name associated with that \$7,000 amount?

A: So the estimated amount was actually a pop-up from our Revenue Recovery Department on Carol Brooks' account.

Q: So that \$7,000 was linked to Ms. Brooks' account?

A: Yes. When she came in to inquire about the account, it was actually a pop-up on her account and the address.<sup>278</sup>

By failing to afford shutoff protection to Ms. Brooks based on its erroneous conclusion that she had engaged in unauthorized use, DTE violated the statutory requirement not to shut off service to an eligible customer during the hearing season for nonpayment of a delinquent account.

As explained above in section 3, if DTE believed Ms. Brooks engaged in unauthorized use, it could only condition continuation or restoration of service to her on the payment of a "delinquent account" that was not in dispute, even if that delinquent account reflected charges for unauthorized use. Given that Ms. Brooks was disputing the unauthorized use allegation, DTE could not lawfully require a deposit as a condition of restoring service.

c. R 460.106 (Count III)

R 460.106 states:

(1) Applicants for service may become new customers by requesting service in person at the utility company office, in writing, by telephone, fax,

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<sup>278</sup> See 4 Tr 346.

or internet, or other means of communication. Using any of these methods, an applicant shall do both of the following:

- (a) Provide positive identification information as defined in R 460.102.
  - (b) Pay a deposit, if required by R 460.109 or R 460.110.
- (2) The utility may also require payment of a delinquent account as a condition of providing or continuing service if the following conditions apply:
- (a) The delinquent account is in the customer's or applicant's name.
  - (b) The delinquent account is not in dispute, owed to the utility, and accrued within the last 6 years. The utility shall provide the applicant with information on the process to refute or contest the delinquent account.

For the reasons stated above, this PFD concludes that Ms. Brooks could not become a “new customer” because she had been receiving service for the past 6 years, whereas a “new customer” is defined under R 460.102(ee) as a customer who has not received the utility’s service within the previous 6 years.

*d. R 460.126 (Count IV)*

R 460.126 provides:

- (1) If a utility overcharges a customer due to a billing error, the utility shall refund or credit the amount of the paid overcharge plus 7% APR interest on the bill immediately following the discovery of the error. Upon customer request, overcharges greater than \$10 shall be refunded within 30 days. A utility is not required to adjust, refund, or credit an overcharge plus 7% APR interest for more than the 3 years immediately preceding discovery of the billing error, unless the customer is able to establish an earlier date for commencement of the error. The interest on the overcharge shall be applied on the 60th day following the paid overcharge.
- (2) If a utility undercharges a customer, the following provisions apply:
  - (a) In cases that involve unauthorized use of utility service the utility may backbill the customer for the amount of the undercharge using the commission-approved process for estimating the bill. The utility may

charge fees for unauthorized use of utility service in accordance with commission-approved tariffs.

(b) In cases that do not involve unauthorized use of utility service, the utility may backbill the customer for the amount of the undercharge during the 12-month period immediately preceding discovery of the error, and the utility shall offer the customer reasonable payment arrangements for the amount of the backbill, which shall allow the customer to make installment payments over a period at least as long as the period of the undercharge. The utility shall take into account the customer's financial circumstances when setting payment amounts.

The Commission rules define "billing error" as follows:

"Billing error" means an undercharge or overcharge that is caused by any of the following:

- (i) An incorrect actual meter read by a company representative.
- (ii) An incorrect remote meter read.
- (iii) An incorrect meter constant.
- (iv) An incorrect calculation of the applicable rate.
- (v) A meter switched by the utility or a utility representative.
- (vi) An incorrect application of the rate schedule.
- (vii) Another similar act or omission by the utility in determining the amount of a customer's bill. An undercharge or overcharge that is caused by a non-registering meter, a meter error, or the use of an estimated meter read or a customer read is not a billing error.

DTE's response to Ms. Brooks' claim that DTE made a billing error and should only have been able to backbill Ms. Brooks for one year of the undercharge under this rule is to rely on its assertion that Ms. Brooks engaged in unauthorized use. As set forth above, R 460.126 does not limit DTE's ability to backbill in the event of a billing error attributable to unauthorized use. Nonetheless, for the reasons explained above, Ms. Brooks did not engage in unauthorized use. Instead, DTE's failure to bill Ms. Brooks based on its own error in this case fits the definition of billing error quoted above. DTE thus violated R 460.126 because DTE told Ms. Brooks repeatedly that she

was responsible for paying the entire \$7000 estimated underbilling. DTE also violated R 460.126 because DTE told Ms. Brooks that she needed to pay the entire \$7000 amount all at once, and that DTE would not offer her any payment arrangement or take into account her financial circumstances.

DTE argues that it did not violate this section because it ultimately restored Ms. Brooks' service without any payment, over a year after it disconnected her service.<sup>279</sup> Because DTE demanded the full payment and because it refused to offer a payment arrangement or take into account her financial circumstances, DTE's agreement to restore service after a year, and after Ms. Brooks hired an attorney, does not absolve DTE of the responsibility for violating this rule.

*e. R 460.138 (Count V)*

Ms. Brooks also asserts that DTE violated the requirements of R 460.138, which requires advance notice of shutoff:

(1) A utility shall not shut off service pursuant to the provisions of R 460.141 or R 460.142 unless it sends a notice to the customer by first-class mail or personally serves the notice not less than 10 days before the date of the proposed shut off. The utility shall send notice to the account name and address and to the address where service is provided if the service address is different and the notice can be delivered at that address. A utility shall maintain a record of the date the notice was sent.

There is no dispute that DTE did not provide notice prior to shutting off service on January 6, 2015. DTE argues that it was not obligated to provide notice because Ms. Brooks was not a customer, and because the shutoff was not "involuntary" because it was for unauthorized use. Consistent with the conclusions reached above, this PFD concludes that DTE violated this provision by shutting Ms. Brooks' service off without

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<sup>279</sup> See DTE reply brief, pages 9-10. Note that DTE is still asking in this case for full payment of the \$7000 estimated underbilling.

notice, under the mistaken belief that she had engaged in unauthorized use. Shutoff of service is defined in R 460.102(pp) as “a discontinuance of utility service that is not requested by a customer.” DTE was aware that Ms. Brooks did not want her service disconnected and was disputing the unauthorized use allegation.

*f. R 460.141 (Counts VI, VII and VIII)*

Ms. Brooks argues that DTE violated several requirements of R 460.141, which provides in key part:

(1) For an involuntary shutoff, at least 1 day before shutoff of service, the utility shall make not less than 2 attempts to contact the customer by telephone, if a telephone number is available to the utility, to advise the customer of the shutoff and what steps the customer must take to avoid shutoff. If the utility uses an automated notification system, it shall document the process for ensuring that at least 2 attempts are made to notify the customer of the pending shutoff. If the telephone number is not available, the customer has no telephone, or the telephone contacts are not made, the utility shall either leave a notice at the premises advising the customer that service will be shutoff on or after the next business day or send notice by first-class mail postmarked at least 5 business days before shutoff of service is scheduled. The utility shall document all attempts to contact the customer.

(2) Immediately preceding the shutoff of service, an employee of the utility who is designated to perform that function may identify himself or herself to the customer or another responsible person at the premises and may announce the purpose of his or her presence.

(3) The employee shall have in his or her possession a copy of the delinquent account of the customer and request any available verification that the outstanding claims have been satisfied or are currently in dispute. Unless the customer presents evidence that reasonably indicates that the claim has been satisfied or is currently in dispute, the employee may shut off service.

\* \* \*

(7) When the utility employee shuts off service, the employee shall leave a notice in a conspicuous place upon the premises. For all forms printed after the effective date of these rules, the notice shall state that service has been shut off, the address and telephone number of the utility where the customer may arrange to have service restored, and that any efforts

by the customer to restore his or her own service are unlawful and dangerous.

Ms. Brooks argues that DTE did not provide advance notice of the shutoff as required by subsection 1, did not present a copy of the delinquent account as required by subsection 3, and did not leave a shutoff notice in a conspicuous place as required by subsection 7. After arguing that no notice was required because Ms. Brooks was not a customer, DTE argues that this provision does not apply because DTE's shutoff for unauthorized use was not an involuntary shut off, and there was no "delinquent account" for the site.<sup>280</sup>

This PFD concludes that DTE violated subsections 1 and 7 of this rule, by failing to notify Ms. Brooks of the shutoff before it occurred, and failing to leave a shutoff notice at her premises. Ms. Brooks should have been considered a customer for the reasons explained above, and DTE erroneously concluded she engaged in unauthorized use. DTE did not violate subsection 3 because the employee is not required to but "may" announce his or her presence at the time of shutoff.

*g. R 460.144(2) (Count IX)*

Ms. Brooks argues that DTE violated R 460.144(2) by not restoring service promptly after it agreed to do so on February 18, 2016, not completing the restoration until February 24, 2016. R 460.144(2) requires:

When a utility is required to restore service at the customer's meter manually, the utility shall make every effort to restore service on the day the customer requests restoration. Except for reasons beyond its control, the utility shall restore service not later than the first working day after the customer's request.

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<sup>280</sup> See DTE brief, page 18.

DTE cites Ms. Robinson's testimony and the records in Exhibit R-10. It argues that the company agreed to restore service voluntarily, not because it was required, and experienced an additional day's delay due a windstorm that prevented reconnection at the pole. Given the protracted litigation between the parties, and the limited record evidence, this PFD does not conclude that DTE violated this provision. As is clear from this PFD, there are several rules DTE violated by wrongly viewing Ms. Brooks as having engaged in unauthorized use, and refusing to consider that it might be wrong. At least by February 24, 2016 it restored service, albeit in the company's view "voluntarily." Given the winter conditions, it is plausible that reasons beyond its control prevented DTE from restoring service sooner, once it agreed to do so.

*h. R 460.148(1) (Count X)*

R 460.148(1) imposes requirements virtually identical to MCL 460.10t. It provides:

Except where unauthorized use of utility service has occurred, a utility shall not shut off service to an eligible low-income customer during the space heating season for nonpayment of a delinquent account if the customer pays to the utility a monthly amount equal to 7% of the estimated annual bill for the eligible customer and the eligible customer demonstrates, within 14 days of requesting shutoff protection, that he or she has made application for state or federal heating assistance. If an arrearage exists at the time an eligible low-income customer applies for protection from shutoff of service during the space heating season, the utility shall permit the customer to pay the arrearage in equal monthly installments between the date of application and the start of the subsequent space heating season.

For the same reasons discussed in section b. above, this PFD finds that DTE violated this provision, because it knew that Ms. Brooks was a low-income customer, and seeking shutoff protection, but declined to offer her those protections, and because it treated the \$7000 amount it claimed she owed as a delinquent account.

*i. R 460.151(1), R 460.152, and R 460.163 (Counts XI, XII, XIII)*

In the remaining counts of her complaint, Ms. Brooks claims that DTE violated the rules pertaining to dispute resolution. R 460.151(1) states:

(1) If a customer advises a utility, or if the utility is notified by a regulation officer on behalf of a customer, before the date of the proposed shutoff of service that all or part of a bill is in dispute, then the utility shall do all of the following:

(a) Immediately record the date, time, and place the customer made the complaint and transmit verification to the customer.

(b) Investigate the dispute promptly and completely.

(c) Advise the customer of the results of the investigation.

(d) Attempt to resolve the dispute informally in a manner that is satisfactory to both parties.

(e) Provide the opportunity for the customer to settle the disputed claim or to satisfy any liability that is not in dispute.

R 460.152 requires DTE to offer a customer the opportunity for an informal hearing to resolve their dispute, and includes a requirement that the utility complete the necessary investigation. R 460.163 precludes a utility from shutting off service “related to the matter in dispute pending the decision of the commission staff, except pursuant to the terms of an interim determination.”

Ms. Brooks argues that DTE refused to investigate her dispute promptly or completely, and refused to advise her of the results of any investigation. Ms. Brooks points to the record evidence regarding her calls and visits to DTE in December 2014 and January 2015. DTE argues that it was not required to follow the requirements of these rules because Ms. Brooks was not a customer.<sup>281</sup>

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<sup>281</sup> See DTE brief, pages 19-20.

The ALJ finds DTE's refusal to treat Ms. Brooks' dispute seriously and within the requirements of these rules to be troubling. Although DTE had not conducted a "theft investigation," DTE refused to consider any possibility that it had made a mistake in accusing Ms. Brooks of unauthorized use of utility services. The dispute resolution procedures are designed to help correct significant errors such as this, which resulted in Ms. Brooks' service being disconnected for over a year. Yet not only did DTE not offer Ms. Brooks a hearing to resolve her dispute, DTE refused to provide her with a bill, for reasons that do not make much sense, since DTE clearly was holding her responsible for the charges. Ms. Reid testified:

DTE Electric does not offer payment arrangements in cases of unauthorized usage for several reasons. First, there was no outstanding bill at the time to offer a payment plan to Carol Brooks. Second, the person with the unauthorized usage is not provided a physical bill until they are ready to pay to avoid instances where the person would a) utilize the bill to declare bankruptcy, or b) take the bill to agencies such as the Michigan Department of Health and Human Services ("MDHHS") and try to get them to pay. Agencies do not pay for unauthorized usage though, so when the agency goes through its auditing process and determines that a payment was made on unauthorized usage charges, the payment is retracted. Meanwhile, the customer has fraudulently had service restored and the Company is left with unpaid amounts for unauthorized usage.<sup>282</sup>

DTE should have recognized Ms. Brooks as a customer with a potentially valid dispute and followed the dispute resolution provisions identified above. Instead, DTE violated R 460.151, R 460.152, and R 460.163.

C. Recommended Disposition

For the reasons explained above, this PFD finds it deeply troubling that DTE wrongly accused Ms. Brooks of unauthorized use, and from there, refused to consider any possibility that it might have been mistaken, ultimately refusing to restore

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<sup>282</sup> See 4 Tr 315-316.

Ms. Brooks' electric service for over a year. In the course of its failure to recognize its error, DTE violated several Commission rules and also violated MCL 460.10t as discussed above. The Legislature provides broad remedies for violations of its requirements in MCL 460.10c, which states:

Except for a violation under section 10a(3) and as otherwise provided under this section, upon a complaint or on the commission's own motion, if the commission finds, after notice and hearing, that an electric utility or an alternative electric supplier has not complied with a provision or order issued under sections 10 through 10ee, or that a natural gas utility has not complied with a provision or order issued under section 10ee, the commission shall order any remedies and penalties necessary to make whole a customer or other person that has suffered damages as a result of the violation, including, but not limited to, 1 or more of the following:

- (a) Order the electric utility, natural gas utility, or alternative electric supplier to pay a fine for the first offense of not less than \$1,000.00 or more than \$20,000.00. For a second offense, the commission shall order the person to pay a fine of not less than \$2,000.00 or more than \$40,000.00. For a third and any subsequent offense, the commission shall order the person to pay a fine of not less than \$5,000.00 or more than \$50,000.00.
- (b) Order a refund to the customer of any excess charges.
- (c) Order any other remedies that would make whole a person harmed, including, but not limited to, payment of reasonable attorney fees.
- (d) Revoke the license of the alternative electric supplier if the commission finds a pattern of violations.
- (e) Issue cease and desist orders.

Given that the disruption to Ms. Brooks' service and the difficulty she has encountered disputing the charge of unauthorized use were clearly avoidable, this PFD recommends that the Commission award Complainant the following relief under this section:

1) attorney fees: Ms. Brooks should be given an opportunity to recover her legal costs including attorney fees, in a subsequent proceeding as the Commission provided for in its April 25, 2005 order in Case No. U-14025.

2) a fine: The ALJ recommends that the Commission fine DTE in the amount of \$10,000, in the mid-range for a first offense under this section. The Complainant seeks a share of any fine awarded, but any fine assessed is not payable to the Complainant under MCL 460.10c.

3) a cease and desist order: The ALJ recommends that the Commission direct DTE to cease and desist shutting off service to eligible low-income customers during the heating season based on a claim of unauthorized usage, without first providing the customer an opportunity for a hearing to dispute the claim.<sup>283</sup> DTE should be directed to develop a form of notice similar in essentials to the form of notice used by Consumers Energy, as shown in Exhibit C-17, and to provide it to the Commission staff for its review.

DTE argues that it should recover the full amount of its estimated underbilling. The Complainant argues that DTE should be limited to backbilling Ms. Brooks only for the most recent 12-month period prior to January 6, 2017 when it disconnected her service, but also that DTE should not be allowed to collect that amount because DTE destroyed Ms. Brooks' meter without testing it for accuracy, consistent with Ms. Brooks' motion for spoliation sanctions. Although the Administrative Law Judge is concerned that DTE destroyed Ms. Brooks' meter without providing for it to be tested for accuracy given the large sum it was demanding that she pay, the potential impact of any meter

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<sup>283</sup> Of course this recommendation is not intended to preclude emergency shutoffs for safety reasons, or actions such as Mr. Trousdale's in tagging breakers at Ms. Brooks' residence for safety reasons.

error is minimized by the finding in this PFD that DTE may only bill Ms. Brooks for that 12-month period provided for in R 460.126. There is no evidence in this record regarding the potential magnitude of any meter error. Thus, this PFD finds that DTE should be allowed to bill Ms. Brooks for usage over the 12-month period ending January 6, 2017, offering a payment plan that allows her to pay the billed amount over at least 12 months, and takes into account her financial circumstances.

Finally, the ALJ recommends that the Commission consider asking its Staff to conduct an investigation to determine how DTE recorded 60 meter readings over a five-year period from this meter, and did not realize that it was not billing anyone for that electricity. As DTE notes in its reply brief at page 1, footnote 1: “Electric service is never “free” since someone has to pay for it. In this instance, DTE Electric’s customers have essentially been paying for Ms. Brooks’ electric service during the 62 months in question.”

## **V.**

### **CONCLUSION**

For the reasons explained above, this PFD recommends that the Commission adopt the findings of fact and conclusions of law presented in section IV above, award Complainant the recommended relief, and consider further action to ensure that DTE follows the Commission’s billing rules in providing utility service.

MICHIGAN ADMINISTRATIVE HEARING  
SYSTEM  
For the Michigan Public Service Commission

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Sharon L. Feldman  
Administrative Law Judge

Issued and Served:  
June 15, 2017